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OSGOODE HALL
EXAMINATION QUESTIONS;
GIVEN AT THE
EXAMINATIONS FOR CALL WITH AND WITHOUT HONOURS,
AND FOR CERTIFICATES OF FITNESS,
WITH CONCISE ANSWERS:
AND
THE STUDENT'S GUIDE,
A COLLECTION OF
DIRECTIONS AND FORMS FOR THE USE OF STUDENTS-AT-LAW
AND ARTICLED CLERKS.

BY
CALVIN BROWNE AND EDWARD MARION CHADWICK,
Students-at-Law.

TORONTO:
ROLLO & ADAM, LAW BOOKSELLERS AND PUBLISHERS,
KING STREET EAST.

1862.

Entered, according to Act of the Provincial Legislature, in the year of our
Lord, one thousand eight hundred and sixty-two, by CALVIN BROWNE
and EDWARD MARION CHADWICK, in the office of the Registrar of the
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TORONTO :
PRINTED BY LOVELL AND GIBSON, YONGE STREET.

e year of our
ALVIN BROWNE
gistrar of the

TO THE HONOURABLE
JOHN HILLYARD CAMERON, D.C.L., Q.C.,

TREASURER OF THE
LAW SOCIETY OF UPPER CANADA,

This Work

IS, WITH HIS PERMISSION,

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BY

THE AUTHORS.

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PREFACE.

TO THE LAW STUDENT,—

It has been for some time the practice with the Law Student, preparing for his examination, to use as an aid to his reading such of the questions given at the previous examinations as he could obtain, and the use of such has been found to be of great assistance—not only in shewing to the student the nature and style of the questions given at the examinations, but also more particularly, by suggesting important points in so many different lights—giving him a clearer insight into those points than he might have obtained from reading.

These and similar considerations have induced the Authors to undertake the present work, in order to put within the reach of every student the questions which have been given at the examinations for call, with and without honors, and for certificates of fitness, since those examinations respectively were instituted; and the answers have been added, as they also, it is hoped, may add to the utility of the work.

Some persons, we fear, may look upon such a work as the present as intended to enable students to “cram” for their examinations. This idea we wish particularly to dispel. Nothing is farther from our intention. We intend that our work shall be of use to the student as an *aid* to the study of the books upon which he will be examined, but never to be read in *lieu* of them.

In arranging the questions, we have, as a general rule, placed

them in their chronological order, omitting repetitions (though some repetitions must unavoidably occur), and questions which have become entirely obsolete. We have placed the questions under the heads of the books upon which they have been given, rather than under the head of the several subjects (as Mr. Hallilay has done in his book of questions and answers), as we have considered our mode of arrangement more convenient, and better suited to the objects we had in view in the compilation of the work.

It only remains for the Authors to state that they are indebted to members both of the Law and Equity bar, whose names the Authors are not at liberty to mention, for kind assistance in the revision of answers, and which assistance has, they feel, been of great service in securing the accuracy of the work.

TORONTO, May, 1862.

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EXAMINATION QUESTIONS.

BLACKSTONE'S COMMENTARIES.—VOL. I.

Question 1.—State what is meant by saying that a custom must have been “continued,” and must be “reasonable,” and “certain.”

Answer.—By the first is meant that if the right to a custom has been for a moment destroyed, the revesting of that right would bring its commencement within the time of memory, whereby the custom would fail, as the existence of a custom from time immemorial, is the first requisite to its validity, 77. It must be “reasonable,” in that there must be no good legal reason which can be assigned against it, 77. And by being “certain” is meant that the custom must be clearly defined, and of such a nature that there can be no doubt or uncertainty in the manner of observance, 78.

Q. 2.—What is Blackstone’s definition of the Sovereign’s prerogative? And how does he describe or classify it?

A.—The Sovereign’s prerogative is that special power and pre-eminence which the Sovereign has over and above all other persons and out of the ordinary course of the common law, in right of the regal dignity. And it is described or classified as of two kinds: Direct, or such positive substantial parts of the royal character and authority as are vested in and spring from the Sovereign’s political person, considered merely by itself without reference to any other extrinsic circumstance; and Incidental, or, exceptions in favour of the Sovereign from those general rules by which the rest of the community is governed, 239, 240.

9. Acts of Parliament derogatory from the power of subsequent Parliaments bind not.

10. Acts of Parliament that are impossible to be performed are of no validity.

Q. 5.—What is meant by saying “the King never dies?”

A.—Our law says that the King never dies, meaning *in his political capacity*: because immediately upon the natural death of one king the sovereignty survives in his successor—the right of the Crown vests *eo instanti* upon his heir, so that there can be no interregnum, 196.

Q. 6.—What is Blackstone's account of the foundation or origin of society?

A.—The wants and fears of individuals, and their sense of their weakness and imperfection; and these keep mankind together, and therefore are the solid and natural foundation of society. He says the formation of society was effected by the means of single families, who formed among themselves the first natural society, which, every day extending its limits, laid the first rudiments of civil or political society: and when it grew too large to subsist with convenience in the pastoral state in which the patriarchs appear to have lived, it necessarily sub-divided itself, by various migrations, into more, 47.

Q. 7.—How many forms of Government are there?

A.—Three. 1, Democracy, when the Sovereign power is lodged in an aggregate assembly, consisting of all the free members of a community; 2, Aristocracy, when it is lodged in a council composed of select members; 3, Monarchy, when it is entrusted in the hands of a single person; and to these three are all other species of government reducible, 49.

Q. 8.—What is Blackstone's classification of the Laws of England?

A.—I. The *Lex non scripta*, or Common Law, which is sub-divided into: 1. General customs observed by the whole kingdom; 2. Particular customs, affecting the inhabitants of particular districts only; 3. Certain particular laws, which by custom are adopted and used by some particular courts of pretty general and extensive jurisdiction, 63, 67. II. The *Lex scripta*, or Statute Law, 63. The first of these (which receives its force from custom or immemorial usage, and is proved and evidenced by the records

of the several courts of justice, in the reports of judicial decisions, and in the treatises or digests of the learned sages of the profession, 63) is derived from the laws of the ancient Britons, with which have been incorporated at various times many customs derived from the Romans, the Picts, the Saxons, the Danes, and the Normans, 64. The third sub-division of this branch of the law is derived from the civil law and the canon law, 79. The *Lex scripta* is composed of the Statute Laws of the Realm, 85.

Q. 9.—Does Blackstone place civil and canon law, so far as they prevail in England, in the class of written or unwritten law, and why?

A.—Unwritten law—because they derive their force and effect from custom, 79.

Q. 10.—Sketch the history of the introduction of civil and canon law into England, and of their contest for supremacy with the common law, as given by Blackstone.

[We cannot answer this question in a manner satisfactory to the student except by quoting at length from Blackstone: we therefore refer the student to the learned judge's own words. Intro. 17 to 25.]

Q. 11.—When was the Habeas Corpus Act passed? What rights does it give to the subject?

A.—31 Car. II. ch. 2, (1679). It gives to persons who have been imprisoned the right to be brought before the Court of Queen's Bench or Common Pleas for trial, thus rendering it impossible for any one to be deprived of his liberty for an unreasonable length of time, except where the law requires and justifies the imprisonment, 135. It also enacts that no subject of this realm who is an inhabitant of England, Wales or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey or places beyond the sea (where he cannot have the full benefit of the common law) and gives a private right of action to the party suffering, against the person committing and all his aiders, advisers, and abettors, in which action he recovers at the least £500 damages, and treble costs, 137.

Q. 12.—Can a guardian be appointed by the will of any and what person; and is the right so to appoint a guardian given by common law or by statute?

A.—By Statute 12 Car. II. ch. 24, a guardian may be

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appointed by the will of any father, under age or of full age, 462.

Q. 13.—What is treasure trove, and to whom does it belong?

A.—Treasure trove is where any money or coin, gold, silver, plate or bullion, is found hidden in the earth or other private place, the owner thereof being unknown: it belongs to the Crown, unless the owner be found out, when it shall be returned to him, 295.

Q. 14.—What is the meaning of "the King can do no wrong?"

A.—It means that whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people; and that the prerogative of the Crown extends not to do any injury, because it is created for the benefit of the people and cannot be exerted to their prejudice. For the King being necessarily Sovereign over all others, and beyond the power of any human tribunal, cannot be supposed to do any criminal act, as the law manifestly cannot define a wrong without any possible redress, 241, et passim.

Q. 15.—What is the law of England with regard to the guardianship of lunatics?

A.—The guardianship of lunatics is entrusted to the Crown, who shall provide for their custody and sustentation, and preserve their lands and the profits of them for their use when they come to their right mind, or to be transferred to their executors or administrators if they shall die lunatic, the Crown taking nothing to itself, 304. This guardianship is, by special authority of the Crown, entrusted to the Lord Chancellor, who usually commits the care of the person of the lunatic to some person with a suitable allowance for his maintenance, and the heir is generally made the manager or committee of the estate, 305. [See U. C. Con. St. c. 12, s. 31.]

Q. 16.—What three sorts of Colonial Governments are mentioned by Blackstone?

A.—1. *Provincial establishments*, the constitution of which depends on the respective commissions issued by the Crown to the Governors, and the instructions which usually accompany those commissions: under the authority of which provincial assemblies are constituted with the power of making local ordinances not repugnant to the laws of England. 2. *Proprietary Governments*, granted out by the Crown to individuals in the nature of feudatory

principalities, with all the inferior regalities and subordinate powers of legislation which formerly belonged to the owners of counties-palatine, yet still with these express conditions that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother country. 3. *Charter Governments*, in the nature of civil corporations, with the power of making by-laws for their own interior regulations not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation, 108.

Q. 17.—What are the constituent parts of a Parliament under the British Constitution?

A.—The King's majesty sitting there in his royal political capacity, and the three estates of the realm—the Lords Spiritual and the Lords Temporal, who sit together with the King in one house, and the Commons, who sit by themselves in another, 153.

Q. 18.—Where a colony is won by conquest or cession, does it still remain subject to its ancient laws, or do the laws of England apply to it?

A.—It remains subject to its ancient laws until the Sovereign alters them, except such as are against the law of God, as in the case of an infidel country, 107.

Q. 19.—How are Statutes classed by Blackstone?

A.—General or Public, regarding the whole community, and Special or Private, operating upon particular persons and private concerns, 85. Also, Declaratory, setting forth the Common Law when it may have fallen into disuse or become disputable, and Remedial, altering the Common Law—which last class is subdivided into statutes enlarging the Common Law where it is too narrow, and statutes restraining it where it is too comprehensive, 86.

Q. 20.—What is the meaning of a menial servant?

A.—A domestic or servant who lives *intra mœnia*, 425.

Q. 21.—What are the duties of a coroner?

A.—To inquire by jury, *super visum corporis*, concerning the manner of the death of any person who is slain, or dies suddenly in prison, and to commit to prison for further trial, any who may, upon such inquest, be found guilty of murder or homicide, and to inquire concerning their lands, goods and chattels, which

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are forfeited thereby, and whether any deodand has accrued by reason of the death; also to inquire concerning shipwrecks, and concerning treasure trove; and to supply the place of the Sheriff in cases where exception can be taken to the Sheriff for suspicion of partiality—as if he be interested in the suit, or a relation of any of the parties thereto, 348. [See U. C. Con. Stat., c. 125—U. C. Con. Stat., c. 88, which directs coroners to make inquiry concerning fires in cities, towns and villages.]

Q. 22.—What is the difference between a denizen and an alien?

A.—An alien is one who is born out of the allegiance of the Sovereign, that is, out of the dominions of the Crown of England; a denizen is an alien born who has obtained *ex donatione regis*, letters patent to make him a British subject. The latter may take lands by purchase or devise, (but not by grant from the Crown, and not by inheritance, as he cannot inherit from his alien parent,) but an alien cannot hold lands or other estates, for though he may purchase them, he cannot take them to his own use, as the Sovereign is thereupon entitled to them, 374, 372. [In Canada aliens may acquire, hold and convey real estate, by 12 Vic. c. 197, s. 12—Con. Stat., c. 8, s. 9.]

Q. 23.—Upon what is a master's right of action for beating his servant founded?

A.—Upon the injury which he has sustained through the loss of the services of the servant consequent upon such beating, 429.

Q. 24.—What is the distinction between *mala in se* and *mala prohibita*?

A.—*Mala in se* are those things which are forbidden by the Divine or natural law, and *mala prohibita* those which are forbidden by human law; by the former man is bound in conscience—by the latter only partially so, or as far as a submission to the penalty imposed for non-compliance is concerned, 57. (But see note.)

Q. 25.—What is meant by the rights of persons as distinguished from the rights of things?

A.—The rights of persons are those which concern and are annexed to the persons of men; the rights of things are such as a man may acquire over external objects or things unconnected with his person, 122.

Q. 26.—How are the rights of persons divided?

A.—They are divided into, 1. Absolute rights, or those which belong to man in a state of nature, as right of personal security, personal liberty, and personal property. 2. Relative rights, which belong to him as a member of society, as public, or the relations existing between the governors and the governed, magistrates and people, and private, as those existing between master and servant, husband and wife, parent and child, guardian and ward, 123 et seq., 146, 422.

Q. 27.—What is the law of nations ?

A.—The law, depending on the rules of natural law, and upon mutual compacts, treaties, leagues and agreements made between separate independent states, regulating the mutual intercourse of such states, 43.

Q. 28.—How are justices of the peace appointed, and what are their duties ?

A.—They are appointed under the King's special commission, under the great seal, 351. Their duties are to conserve the peace by suppressing riots and affrays, taking securities for the peace, and apprehending and committing felons and other inferior criminals; and two or more of them are empowered to hear and determine all felonies and other offences. In addition to these, numerous duties have been committed to them by various statutes, 354.

Q. 29.—What are waifs ?

A.—Waifs are goods stolen, and waived or thrown away by the thief in his flight for fear of being apprehended, 296.

Q. 30.—On what ground can a master justify an assault in defence of his servant ?

A.—On the ground that he has an interest in his servant, not to be deprived of his services, 429.

Q. 31.—What is municipal law, and into what four branches is it divided ?

A.—Municipal law is the rule of civil conduct, prescribed by the Government of a State for the ordering of its own members, 44: and is divided into: 1. Declaratory Law, defining right and wrong. 2. Directory Law, commanding observance of the right and prohibiting the commission of the wrong. 3. Remedial Law, giving a method for the recovery of private rights and re-

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dressing private wrongs. 4. Vindictory Law, creating punishments for public wrongs, 53 et seq.

Q. 32.—What are the three *absolute* rights of individuals?

A.—1. Personal security, or legal enjoyment of life, limb, body, health and reputation, 129. 2. Personal liberty, or free power of locomotion without illegal restraint or banishment, 134. 3. Private property, or the free use, possession and disposal by each individual of his own lawful acquisitions without injury or illegal diminution, 138.

Q. 33.—How are Parliaments dissolved? Is there any provincial statute on this point?

A.—By the will of the Sovereign, by his demise, (in which case it continues to exist for six months after that event,) and by length of time, on having existed for the space of seven years, 187. [By 7 V. c. 3, s. 1.—Con. St. c. 3, s. 1, it is enacted that the Provincial Parliament shall not be dissolved by the demise of the Sovereign, but shall sit as if there had been no such demise.]

Q. 34.—What are the four chief relations in which persons stand to each other in private life?

A.—1. Master and servant; 2. Husband and wife; 3. Parent and child; 4. Guardian and ward, 422.

Q. 35.—What are the three points to be considered in construing a remedial statute?

A.—The ancient law as it stood at the making of the act, the mischief to be remedied, and the remedy applied by the statute, 87.

Q. 36.—What private relations will justify a battery in defence of another?

A.—Those of master and servant, husband and wife, parent and child, guardian and ward. See 3 vol. 3. 1 vol. 462.

Q. 37.—What is the presumption, as regards the age, at which persons are criminally responsible for their acts?

A.—Under the age of seven an infant cannot be capitally punished; between the ages of seven and fourteen he is *primâ facie* judged innocent, but if he be *doli capax*, capable of discerning between good and evil, he will be held fully responsible; over the age of fourteen, he is punishable in all cases, 462.

Q. 38.—In what light does the law of England regard marriage?

A.—As a civil contract, good and valid in all cases where the parties at the time of making it were *willing* to contract, *able* to

contract, and actually did contract in the proper forms and solemnities required by law; the *holiness* of the matrimonial state being left entirely to the ecclesiastical law, 433.

Q. 39.—What subject is treated of in the first book of the Commentaries? and give briefly the different heads.

A.—The rights of persons, which are: I. Natural persons, whose rights are: 1. Absolute, as rights of personal security, personal liberty and personal property. 2. Relative, as Public, or the relations between the governors and the governed, magistrates and people, and Private, as those existing between master and servant, husband and wife, parent and child, guardian and ward. II. Artificial persons or corporations. *Analysis.*

Q. 40.—What are some of the duties of persons in their private relations?

A.—1. As between master and servant: the duties of the latter are his services, in return for which the former is bound to give him in some shape an equivalent emolument, (for slavery is unknown to the English law,) such as wages, or the instruction given to an apprentice; they are also mutually bound to protect one another, and the master must answer for the acts of the servant done by his command, express or implied, 422 et seq. 2. As between husband and wife: the husband is bound to protect and maintain the wife, who is bound in return to honour and obey him as her lord, 433 et seq. 3. As between parent and child: the parent is bound, as regards legitimate children, or those born in lawful wedlock, or within a competent time thereafter, to maintain, protect, and educate according to the best of his ability; and to illegitimate children, or those born out of lawful wedlock, his duty is maintenance; the duties of the child are to honour, obey, protect and maintain the parent, 446 et seq. 4. As between guardian and ward the duties of each are similar to those between parent and child, 460 et seq.

Q. 41.—What are artificial persons, and how many kinds are there? How may they be created, and how dissolved?

A.—They are bodies politic or corporations, and are established for the purpose of preserving, by a legal immortality, in a perpetual succession, certain rights which would fail in course of time if conferred on natural persons only, 467. Such artificial persons are: 1. Corporations sole, or composed of one person only; 2.

Corporations aggregate, or composed of several persons, 469. They are created by the King's royal charter, and by act of Parliament, also by custom and prescription, in which case the king's consent is supposed to have been given, though the evidence of it has been lost, 472; and may be dissolved by act of Parliament, by the natural death of all the members, by a surrender of the franchise, or by forfeiture of the charter, 484.

Q. 42.—Upon what statutes does the right of a subject to a writ of Habeas Corpus depend?

A.—16 Car. I., c. 10 and 31 Car. II., c. 2, 135.

Q. 43.—In what instances has Parliament assumed the right of altering the succession to the Crown of England?

A.—By Stat. 7, Hen. IV. c. 2, the inheritance of the Crown was settled upon the king and his heirs, the right of the Crown then being in the descent from Philippa, daughter and heiress of Lionel, Duke of Clarence, 203. In 1 Hen. VII. Parliament settled the Crown on the king and his heirs, the title being in Elizabeth of York, whom he afterwards married, 205. By Stat. 25 Hen. VIII. c. 12, the crown was entailed to the king, and the heirs male of his body, and in default of such to his daughter Elizabeth, but this statute was repealed by 28 Hen. VIII. c. 7, by which the Crown was settled on the king's children by Queen Jane Seymour, and his future wives, and in default to such person as the king should appoint; again by 35 Hen. VIII. c. 1, the Crown is limited to Prince Edward, after him to the Lady Mary, and then to the Lady Elizabeth, and to their respective heirs, 206. In the latter end of the reign of King Charles II., a bill was brought forward with the object of altering the course of succession to the prejudice of the king's brother James, presumptive heir to the throne, which passed the House of Commons, but was rejected by the Lords, who however did not dispute the right of Parliament to alter the succession, 210. In 1688 the Lords and Commons, having declared the throne vacant by the abdication of James II., settled the Crown upon William and Mary, Prince and Princess of Orange, (the king having the sole exercise of the regal power,) and to the survivor of them, and the heirs of the body of the Princess, and in default of such issue, to Anne, Princess of Denmark, and the heirs of her body, and in default of such issue, to the heirs of the body of the Prince of Orange, 214. Also it was

enacted by 1 W. & M. St. 2, c. 2, that no papist, and no one who married a papist, should succeed to the throne, 216. And by 12 & 13 W. III. c. 2, the remainder of the Crown, expectant on the death of King William and Queen Anne, without issue, was settled upon the Princess Sophia, daughter of Elizabeth, Queen of Bohemia, (who was the daughter of James I.,) and the heirs of her body, being protestants, 216. By these three last enactments the hereditary succession of the heirs of James II., was altered.

ADDISON ON CONTRACTS.

Question 1.—How many kinds of contracts are there? name them.

Answer.—Three. Contracts by matter of record, contracts by deed, and simple contracts, 2.

Q. 2.—What liability, if any, does a bailee of goods without reward incur?

A.—He is bound to take the same amount of care of the goods accepted by him to keep, that he has ordinarily taken of his own property, and will be liable only for gross negligence in the keeping of them, but will not be responsible for common neglect or ordinary casualties, 525. See Tomlin's L. Dic. tit. *Bailee*.

Q. 3 —If a surety pay the creditor, state his rights as against his principal, and co-sureties (if any) respectively.

A.—The moment the principal makes default, the surety may step in and discharge the liability, and have recourse to the principal for reimbursement, 57, 60, 672. After the liability of the principal arises, if one co-surety pay the creditor, he has recourse to his co-sureties for contribution, and may recover from them their several proportions of the common liability in an action for money paid by him for their use, 672, 673. See *Kemp v. Finden*, 12 M. & W. 421; also *Story's Equity Juris.* §492 *passim*.

Q. 4.—Mention cases in which one labouring under an incapacity to contract as principal may nevertheless contract as agent for another.

A.—An infant, 622, or feme-covert may become an agent, the latter even for her husband, 697. See *Prestwick v. Marshall*, 5

M. & P. 513; 7 Bing. 565; Lord v. Hall, 8 C. B. 627; also Smith's Mer. L., 120; also aliens and persons attainted. See Story on Agency, §7.

Q. 5.—Generally by what law is a contract made abroad to be interpreted?

A.—All contracts made in one country concerning land and houses and immovable property situate in another country, must be interpreted according to the law of the country in which the property is situate, the "*lex loci rei citæ*," and not by the "*lex loci contractus*." See Story's Conflict of Laws, §§ 424, 428. But contracts concerning moveables and personalty receive their interpretation either from the law of the country in which the contract is made, the "*lex loci contractus*," or the law of the country in which the contract is to be performed, 861.

Q. 6.—What law governs when a contract made abroad is to be executed in a specified country?

A.—The law and custom of the place of performance generally prevails in all that relates to the fulfilment of the contract, 861.

Q. 7.—On a contract made abroad, by what law is the remedy governed?

A.—The remedy is governed by the law of the country where the remedy is sought, 861. See *Lervux v. Brown*, 12 C. B. 808.

Q. 8.—State the chief grounds of distinction between specialties and simple contracts.

A.—Specialty contracts are such as are made by matter of record, or by instrument under seal and are binding on the party executing, although there be no consideration, (except in the case of certain deeds framed to pass estates in land under the Statutes of Uses); simple contracts are such as are not under seal, nor does the obligation arise by matter of record, but by writing not under seal, or by mere oral evidence, and are not valid unless founded on a sufficient consideration, and do not, when in writing, (with the exception of bills and notes,) import a consideration. See 2 Steph. Com. ch. 5, 3rd Ed.; Smith's Mer. L. 267, 5th ed.; also a specialty creates an estoppel, and cannot be impugned by any of the parties, which is not the case as regards a simple contract. Another difference is, that in administering legal assets a specialty debt has priority over a simple contract debt, 2. See Matthews' Guide to Ex. & Ad. 154., 2nd ed. 2.

Q. 9.—Mention some of the principal kinds of simple contracts required by law to be in writing.

A.—Where any contract is made of lands, tenements or hereditaments, or any interest therein; where an executor or administrator promises to answer damages out of his own estate; where a man undertakes to answer for the debt, default or miscarriage of another; where any agreement is made upon consideration of marriage; where there is any agreement not to be performed within a year from the making thereof, 29. Statute 29 Car. 2, c. 8, s. 4.

Q. 10.—Is a sale of growing timber a sale of an interest in land within the Statute of Frauds? and if so, why?

A.—It is a sale of an interest in land within the Statute of Frauds, because it is not distinguishable from the land until actual severance, 31. See *Crosby v. Wodsworth*, 6 East., 610.

Q. 11.—Is a contract for the sale of personal estate made on a Sunday valid?

A.—No action can be brought for the price of goods sold on a Sunday in the ordinary course of the trade or business of the vendor, unless the sale is within the exception of the act which permits food to be dressed and sold in inns, &c., to persons who cannot otherwise be provided for. See 29 Car. 2, c. 7—commonly called the Lord's Day Act. But if the contract for the sale is merely projected and proposed on a Sunday, and carried into effect on a subsequent week day, it is not illegal; but if the contract of sale be concluded on the Sunday, it will be void, although it may not be fulfilled by the delivery of the goods until a subsequent week day, 111. See *Bloxsome v. Williams*, 5 D. & R. 82; 3 B. & C. 233.

Q. 12.—At whose risk are goods delivered by a vendor to a carrier to be conveyed to a vendee?

A.—At the risk of the carrier, 496, et seq. See *Williams v. Cranston*, 2 Stark, 82.

Q. 13.—What difference is there between a common carrier and a warehouseman having the charge of goods, in their respective business?

A.—A common carrier is responsible for the safe delivery of the goods entrusted to him to carry, unless such delivery was prevented by some inevitable accident which no human care or skill could have provided against, 496. But a warehouseman is only bound

to exercise that amount of care and vigilance for their preservation which the most prudent and careful of men exercise for the protection of their own property, 462.

Q. 14.—Where goods are sold by sample, and the goods delivered do not answer the sample, what course should the vendee take to discharge himself from the contract?

A.—The vendee can return the goods so delivered, and if the price has been paid, he can bring an action to recover the money paid, or he may treat the contract as a subsisting one, and retain the goods in his own hands or re-sell them, and sue specially upon the contract, and so recover the damages he has sustained. See *Poulton v. Lattimore*, 9 B. & C. 265. If the vendor refuse to accept the goods when returned by the vendee, they will then be at the risk of the vendor, 273. See *Okell v. Smith*, 1 Stark, 107, and *Smith Mer. L.* 492.

Q. 15.—Where goods are sold for cash, but the price is not actually paid, (the sale being in writing), but the goods not delivered, has the vendee any, and what remedy against the vendor for not delivering the goods?

A.—If the vendor neglects to deliver the goods, the purchaser may sue on the contract for the recovery of compensation, 234.

Q. 16.—Where goods are obtained under a colour of a purchase with fraudulent intention of never paying for them, what remedies are open to the vendor?

A.—He can treat the contract as void, and can recover the goods by an action of trover; see *Load v. Green*, 15, M. & W. 216. Or if he does not think fit to avail himself of the fraud, he may treat the contract as a subsisting contract, and sue for the price, provided he makes his election before the goods have been resold and transferred to a *bond fide* purchaser, 149. See *White v. Garden*, 10 C. B. 919.

Q. 17.—Can a contract, sufficient to satisfy the Statute of Frauds, be collected from several distinct documents, and can the connection between them be shewn by parol evidence?

A.—The contract can be collected from several distinct documents, if they so refer to one another that the connection appears on the face of them, but their connection cannot be established by parol evidence, 41.

Q. 18.—In what cases will the principal be liable for the negligence of his agent?

A.—Where the negligence naturally and inevitably results from the performance of the thing ordered to be done by the principal, or has been occasioned by the negligent mode of doing the thing, or the negligent execution of the orders of the principal; but not where the agent exceeds his authority, 528, 540, 636.

Q. 19.—In what cases will a master be held liable for goods bought on his credit by a servant?

A.—Servants entering into contracts on behalf of their masters in the usual course of their employment bind the latter by their contracts; "if a servant usually buy for the master upon tick, and the servant buys some things without the master's order, yet if the master were trusted by the trader he is liable," 624. See *Holt, C. J.*, 1 *Show.* 95.

Q. 20.—Mention some cases in which a master will not be liable for goods purchased on his credit by a servant?

A.—If a man send his servant with ready money to buy goods and the servant buy upon credit, the master is not chargeable, (except where the servant usually bought for his master upon credit). If the seller has shown a want of due caution, or has trusted the servant to an improper extent, the principal will not be liable, 624, 625. See case cited to last question.

Q. 21.—Is there any and what distinction between the liability of a corporation on an executed and executory contract not under seal?

A.—Assumpsit lies against a corporation on an executed contract not under seal when the work done and the materials supplied were necessary to the purposes for which it was erected, 79. See *Sanders v. St. Neot's Union*, 8 Q. B. 810, also *Smith's Mer. L.* 115. A contract not under seal cannot be enforced against a corporation whilst it remains executory, 78. *East Lon. W. Co. v. Bailey*, 4 Bing. 287; *Finlay v. Brist. & Ex. R. Co.* 7 Exch. 416.

Q. 22.—Upon what principal does the right of a wife to pledge her husband's credit for goods depend?

A.—Upon the authority (express or implied) of her husband to act as his agent in purchasing the goods, 697, 698.

Q. 23.—Has an innkeeper a right of lien on all goods of his guest? If not, to what goods does the right extend?

A.—To goods and chattels of his guest generally, if he has not previously agreed to give him credit for his entertainment; but it does not extend to goods on which he formerly had a lien and lost it, for should he again get the goods into his possession he cannot detain them for this former lien, 426.

Q. 24.—Need an agreement, which may or may not be performed within a year, be in writing?

A.—The Statute of Frauds does not extend to contracts which are to be performed upon the happening of some uncertain event, and which may not consequently be performed within a year, 40. See *Souch v. Strawbridge*, 2 C. B. 808.

Q. 25.—Is there any and what distinction, between a promise to pay the debt of another, when made to the creditor or the debtor himself?

A.—A promise made to the creditor is within the statute of frauds, and requires a written memorandum; but the latter is not within the statute, 36. See *Smith on Contracts*, 52; *Eastwood v. Kenyon*, 11 A. & E. 446, E. C. L. R. vol. 39.

Q. 26.—Can money paid on an illegal contract, be recovered back; does it make any difference in this respect whether it be paid to the other contracting party or a stakeholder?

A.—So long as an illegal contract remains executory and unperformed, money deposited by one of the parties in furtherance of the fulfilment of the contract may be recovered back. See *Walker v. Chapman*, cited 2 Doug. 471, a. But when the parties have carried out their unlawful intention, and the illegal act has been accomplished, and both are *in pari delicto*, the law will not give to one of them any remedy against the other in respect of any matter growing out of the illegal transaction, and money paid by one to the other cannot then be recovered back. And if the money is in the hands of a stakeholder it can be recovered back by the depositor, 66, 67, 150, 151. See *Cotton v. Thurland*, 5 T. R. 405. But not after the stakeholder has paid it to the winner. See *Howson v. Handcock*, 8 T. R. 575.

Q. 27.—What is a *Nudum Pactum*?

A.—A *Nudum Pactum* or naked promise is a contract supported by no consideration, as where a man promiseth another to give him certain money such a day or to build a house, or to

render him such certain service, and nothing is assigned for the money, for the building, nor for the service, 12.

Q. 28.—Is a delivery of goods above the value of ten pounds sufficient to satisfy the Statute of Frauds, when there is no written contract or part payment? If not, what more is requisite?

A.—No. There must be an *acceptance* of part of the goods so sold, 33. See 17 sec. Statute of Frauds.

Q. 29.—To what extent must a contract be in restraint of trade to render it void on that account?

A.—Contracts in general restraint of trade, preventing parties from gaining a livelihood in any particular vocation or profession, are absolutely void, as being contrary to public policy as well as oppressive to the individual, 99. See *Hinde v. Gray*, 1 M. & W. 195.

Q. 30.—What amounts to a sufficient giving of time to a principal to discharge a surety? Give reasons.

A.—Any enlargement of the time of payment of a binding contract which ties up the hand of the creditor, and prevents him from suing the principal debtor upon the original obligation, discharges the surety, if it has been made without his assent, inasmuch as the situation of the surety is varied and his liability prolonged beyond what was originally contemplated, 670. See *Combe v. Woolf*, 8 Bing. 162.

Q. 31.—What contracts of infants are absolutely binding?

A.—Contracts for necessities, being such things as are suitable to the rank and station of the infant, 80.

Q. 32.—What is requisite to render a voidable contract by an infant binding on him when of full age?

A.—He must ratify the same in writing under his signature, 88.

Q. 33.—What is the distinction between a pledge and a mortgage as regards—1st, the right to the property; 2nd, the right to possession during their continuance?

A.—1st. By a pledge the right of property is not altered, 318, but by a mortgage the right of property passes to the creditor, subject to be divested by the payment of the debt at the appointed time, 292; 2nd. By a pledge the right of possession is given to the pledgee, 318; but by a mortgage the right of possession remains in the mortgagor, 315, 318.

Q. 34.—What is the difference between dependent and independent covenants?

A.—A dependent covenant is one in which the performance of one person depends on the prior performance of another, and till the prior condition is performed the other party is not liable to an action on his covenant. An independent covenant is one in which either party may recover damages from the other for the injury he may have received by a breach of the covenant in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff, 865.

Q. 35.—What is essential to render a contract binding for goods above the value of ten pounds?

A.—To comply with the 17th section of the Statute of Frauds, viz.: That the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized, 33.

Q. 36.—Where goods are sold, and the vendee refuses to accept them, what remedy has the vendor against the vendee, and how should he declare against him?

A.—He may maintain an action to recover damages, and in the declaration he must aver and show that he was ready and willing to deliver the goods to the vendee according to the terms of the contract, 238, see *Boyd v. Lett*, 1, C. B. 222, also *Granger v. Dacre*, 12 M. & W., 484.

Q. 37.—What is necessary to make the guarantor for payment liable on a sale of goods to the party for whom he is guarantor?

A.—The guaranty must be in writing and signed by the party charged, or his lawful agent, and there must be a consideration and a promise shewn by it, 37, 65; see *Smith's Mer. L.* 5 ed. 442; *Matson v. Wharam*, 2 T. R. 80. 19920 the e 97 Con. need not appear

Q. 38.—Is there any implied warranty on the sale of goods?—If yea, why?

A.—With a view to prevent fraud and deceit, and make men fair and honest, and upright in their dealings and transactions, the law implies a general promise or warranty from each of the parties to a contract, that he does not practice any deceit or fraudulent con-

dealment to benefit himself at the expense of the others in the sale of goods, 55, 228, 268, see *Teto v. Blades*, 5 Taunt. 657.

Q. 39.—Suppose the vendor contracts with the vendee to manufacture for him a steam engine, and the engine is delivered, but from the defective workmanship, will not work. Has the vendee any remedy, and what? And is there any implied warranty in such a case?

A.—The vendee has an action against the vendor as there is an implied warranty on the part of the latter, that the article he makes is fit and proper for the purpose for which it is required, 231, see *Jones v. Bright* 3 M. & P. 155, 5 Bing. 533, also *Gray v. Cox* 6 D. & R. 208, 108.

Q. 40.—Suppose goods are sold and warranted expressly to be of good quality, and a promissory note is given for the price, but the goods are not of good quality, has the vendee any, and if yes, what defence to the note?

A.—Where a bill or note is given for goods sold, the price, amount, and quality of the goods cannot be disputed in an action on the bill or note; but if fraud can be shewn, it is otherwise as between the parties, for there is then no contract, 266, 457, see *Byles on Bills* 99, 100, also *Tye v. Gwynne* 2 Camp. 346, and *Obbard v. Betham*, 1 M. & M. 483.

Q. 41.—Is it necessary that the signature to a memorandum of the sale of goods above the value of ten pounds, should be subscribed? If not, what signature will satisfy the statute? must it be signed by both parties?

A.—It need not be subscribed—it is sufficient if written in such a way as to amount to an acknowledgment by the party that it is his agreement, 45, 46. *Knight v. Crockford*, 1 Esp. 190; *Lobb v. Stanley*, 5 Q. B. 574. It need not be signed by both parties, but only by the party to be charged, 45. *Egerton v. Matthews*, 6 East. 307.

Q. 42.—When a sale is made with all faults, are there any, and if so, what defects in the subject matter of the sale, which will avoid the contract?

A.—Defects of such a nature that a purchaser cannot, by the exercise of any amount of skill, care or attention, or by the most diligent examination, discover them, and which are known to the vendor at the time of sale, 133.

Q. 43.—What is the effect of a policy made "interest or no interest;" and what is an insurable interest?

A.—Such a policy is void, 121, 556. Any pecuniary interest, however small, is an insurable interest, 556.

Q. 44.—What words, accompanying a sale, will amount to a warranty of the quality of goods and of title, respectively?

A.—Every affirmation at the time of sale, respecting the quality of goods, is a warranty, provided it appears to have been so intended: if the vendor affirm at the time of sale that the goods are his, that amounts to a warranty of title. See *Smith Merc. L.* and cases cited.

Q. 45.—Is a contract for the sale of bank stock within the Statute of Frauds so as to require to be in writing?

A.—Bank stock is held not to be "goods, wares or merchandise" within the statute, and therefore a contract for the sale of such requires no writing, 203.

Q. 46.—What difference is there between the rules of construction applicable to *patent* and *latent* ambiguities in a written contract?

A.—A patent ambiguity cannot be construed or interpreted by the aid of parol or extrinsic evidence, but such evidence is admissible to assist the construction of a latent ambiguity, 848, 849.

Q. 47.—Where it was agreed between A. and his creditors and B., that B. should pay the creditors ten shillings in the pound in full satisfaction of their claims, and that they should assign their debts to B.—whether or not is such an agreement within the Statute of Frauds? Give your reasons.

A.—It is not; because by such an agreement the creditors discharge A. from his liability, and therefore B.'s promise is not a promise within the statute, 88. *Bird v. Gammon*, 5 Sc. 213, 3 Bing. N. C. 883; *Goodman v. Chase*, 1 B. & Ald. 297.

Q. 48.—Is there any, and if so, what difference, between the right of a principal to adopt a contract made by his agent, and an *act, ex. gr.* a demand to found an action of trover?

A.—The principal may adopt a contract made by his agent without his authority; but an act, the effect of which would be to raise a duty towards him (the principal) from a third party, and subject that third party to damage for its non-performance, if unauthorised at first, cannot be confirmed by any recognition *ex*

post facto. See Smith Merc. L., 5th ed., 161, 162; Whitehead v. Anderson, 9 M. & W. 518.

Q. 49.—What is the rule with regard to consideration in—1st, simple contracts; 2nd, bills and notes; 3rd, contracts under seal?

A.—1st, Simple contracts require a valid consideration to support them, otherwise they are *naked engagements*, and are consequently void, 812. 2nd, Bills and notes also require considerations to support them and give them legal validity, or they cannot be enforced by compulsion of law; but when the bill or note has been negotiated, and the interests of third parties are involved, the consideration is perfectly immaterial, 17. 3rd, Contracts under seal do not require any considerations beyond the mere will of the party making the contracts: except in the case of certain deeds framed to pass estates in land under the Statute of Uses, 2.

Q. 50.—What deeds intended to pass estates under the Statute of Uses require considerations to support them? And what are the considerations?

A.—Bargain and sale, and covenant to stand seized; the former require a pecuniary consideration, whilst the latter require a consideration such as blood, or kindred or marriage to support them, 10.

Q. 51.—How many kinds of deeds are there? Give the definition of each.

A.—There are two kinds of deeds, viz., deeds *inter partes*, and deeds poll. When a deed is made between several persons, it is called a deed *inter partes*, or indenture. When it is made by one person alone, it is called a deed poll, 9.

Q. 52.—When goods are obtained by a person under colour of a contract intended to transfer the property in the goods to him, and then pledges them, will the pledgee have a lien upon the goods, if yea to what amount?

A.—Yes, to the amount of his advances, 319.

Q. 53.—What risk does a man take, when he makes insurance upon a life generally, without any representation of the state of the life insured?

A.—The insurer takes all the risks, unless there be some fraud in the person insuring, either by his suppressing circumstances which he knows, or alleging what is false, 600.

Q. 54.—If a life is insured for one year from the day of the

date of the policy, and the death occurs that very day twelvemonth, will the insurer be liable? Give reasons.

A.—The insurer will be liable, because, "from the day of the date, excludes the day," 601. See *Howard's Case*, 2 Salk. 625.

Q. 55.—What is necessary to make an executor liable, *de bonis propriis*, for the debts of his testator?

A.—To make an executor liable *de bonis propriis* for the debts of his testator, there must be a new and valid consideration for the promise, or he may bind himself by deed, without any fresh consideration; and he will then be personally liable *de bonis propriis* upon the contract, 1062.

Q. 56.—Does the fact that goods are in the hands of a carrier named by the purchaser affect the vendor's right to stop in transitu? If not, does the right cease by their coming to the hands of any agent of the purchaser?

A.—No. See *Slater v. Le Feuvre*, 2 Bing. N. C. 81. The right does not cease in coming to the hands of any agent, but only to the purchaser's agent *for custody*, 256, 258.

Q. 57.—Can a covenant not to sue be pleaded as a discharge of the cause of action; if not, what is its effect?

A.—Where the creditor has covenanted that he will not put his contract in suit at any time, there the covenant is pleadable in bar as a release, because in effect it is so; but when the covenant is that it shall not be put in suit for a certain time limited in the deed, there it is only a covenant, and for a breach thereof an action is maintainable; but it is not pleadable in bar unless it be a covenant not to sue for a limited time, with a proviso for forfeiture if an action be brought within the time, in which case it operates as a bar by force of the condition, if the action be brought within the time, 1075.

Q. 58.—Is there any exception to the rule that a right of action once suspended is gone forever?

A.—Where a right of action is suspended by the acceptance of a bill of exchange or promissory note, such action revives upon the dishonor of the bill or note, 1118. See *Belshaw v. Bush*, 11 C. B. 201.

Q. 59.—Enumerate the contracts required by the *Statute of Frauds* to be in writing. To what extent has this been extended by subsequent statute?

A.—Leases of lands and tenements for a term exceeding three years, and reserving rent less than two-thirds of the full improved value of the land, (s. 1.) By 8 & 9 Vic., c. 106, such leases must be by deed, 28. See U. C. Con. St. c. 90, s. 4. Promises by an executor or administrator to answer damages out of his own estate. Promises to answer for the debt, default, or miscarriage of another person. Agreements made in consideration of marriage. Contracts for sales of land, tenements or hereditaments, or any interest in or concerning them. Agreements not to be performed within the space of a year after the making thereof, (s. 4). Contracts for the sale of goods, wares, or merchandise for the price of £10 or upwards, where there is no acceptance of any part thereof and no earnest given, (s. 17) which has been by 9 Geo. IV., c. 14, s. 7, extended to contracts for the sale of goods of the value of £10 and upwards, notwithstanding the goods be intended to be delivered at a future time or may not at the time of the contract be actually made or ready for delivery. U.C. Con. St. c. 44, s. 11. See Smith on Contracts, 38, 40, 73, 75.

Q. 60.—What is the difference, in its effect upon a contract, of the *consideration* being partly legal and partly illegal, and the *contract itself* (for a valid consideration) being partly legal and partly illegal?

A.—If a part of an entire consideration is illegal, the whole contract is void, but if the consideration be legal and part of the contract illegal, the part which is legal can be enforced, 92, 147. See Smith on Contracts, 122.

Q. 61.—Where a contract is made by parties residing in different places, by the medium of letters, what determines the *locus contractus*?

A.—The *place* where *final assent* has been given by one party to an offer made by another, is the place where the contract is considered to have been made, 862.

Q. 62.—In what cases will a contract in partial restraint of trade be upheld?

A.—Contracts restraining the exercise of a trade or profession in particular localities, are good and valid when there is a fair and reasonable ground for restriction, as in the case of the sale of the good-will of a trade or business in a particular locality where the

vendor covenants or agrees not to carry on the same business on the same spot in opposition to the purchaser, 100.

Q. 63.—Mention some cases in which a representation made by the vendor at the time of sale will, and some in which it will not, amount to a warranty.

A.—If the seller of a horse says you may depend upon it that the horse is perfectly free from vice, that is a very sufficient warranty, though the word warrant was not used; and if the purchaser of a horse tells the vendor in a letter "You represented the horse to me as a five year old," and the defendant answers, "The horse is as I represented," this is evidence from which a warranty may be inferred. But if one sell purple to another, and saith to him this is scarlet, the warranty is to no purpose, for the other may perceive it, and this gives no cause of action to him: to warrant a thing that may be perceived at sight is not good. 126, 128. See *Cave v. Coleman*, 3 M. & R. 4; *Salmon v. Ward*, 2 C. & P. 211, also, *Baily v. Merrell*, 3 Bulstr. 95.

Q. 64.—What will amount to a sufficient acknowledgment in writing by a debtor, to take a case out of the Statute of Limitations?

A.—Any writing signed by a defendant, admitting that a sum of money is due upon a bond or deed or simple contract at the time of making of the admission, will revive the remedy upon the contract, although it contains upon the face of it no express promise to pay or to make satisfaction, 1210.

Q. 65.—What is a sufficient consideration for a promise? Must it of necessity be an advantage to the person promising?

A.—The party making the promise must have obtained some advantage, or the party to whom it is made must have suffered some loss, or sustained some injury and inconvenience, in consequence of the making and acceptance of the promise. It is sufficient if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking. 11, 18. See *Bunn v. Grey*, 4 East. 194, per Lord Ellenborough, C. J.

Q. 66.—Does the performance of an act which the party is under a legal obligation to perform constitute a good consideration for a promise?

A.—It does not, 14. See *Harris v. Watson*, Peake, 102; *Bridge*

v. Cage, Cro. Jac. 103, and *Collins v. Godfrey*, 1 B. & Ad. 956, 957.

Q. 67.—In the case of simple contract debts, is a *positive refusal to pay*, a sufficient acknowledgment to take the debt out of the Statute of Limitations?

A.—At one time it was held sufficient. The tide of authorities, however, changed, and the courts began to require the acknowledgement to be such as to justify them in inferring therefrom a promise to pay, 1210. See *Linley v. Bonsor*, 2 Bing. N. C. 241.

Q. 68.—Mention any contracts which will be binding if under seal, but not otherwise.

A.—All unilateral, or one-sided undertakings and engagements, where there is no no mutuality of contract, and nothing is given or agreed to be done, and nothing has been done as the consideration or inducement for the promise. Thus where a father made an oral gift of some colts to his son, but kept them in his own possession until the day of his death, this was not a good undertaking and to be binding must be by deed, 27. See *Irons v. Smallpiece*, 2 B. & Ald. 551.

Q. 69.—If a man through some mistake or misapprehension, or forgetfulness of facts, has received money to which he is not justly and legally entitled, and which he ought not, *in foro conscientie* to retain, how does the law regard him?

A.—The law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise from him to pay over the amount to such owner, 62. See *Kelly v. Solari*, 9 M. & W. 58.

Q. 70.—Is an infant liable on a bill of exchange given for necessities? Give your reasons.

A.—It has been held that an infant cannot make himself liable upon a bill of exchange even for necessities, 80. See *Williamson v. Watts*, 1 Camp. 552. Because he could not be engaged in any mercantile transaction, and a bill of exchange is essentially mercantile. See *Smith on Contracts*, 222, and *Harrison v. Colgrave*, 16 L. J., (C. P.) 198.

Q. 71.—An infant contracts for necessities, and gives a bond to secure the payment thereof, can he be made responsible for the amount so secured? Give your reasons.

A.—It has been said, that if an infant has given a bond to secure the payment of money, he cannot afterwards be sued on the first simple contract, as the specialty operates as an extinguishment of the simple contract debt. See *Tapper v. Davenant*, 3 Keb. 798; Bull. N. P. 153. But all penal obligations entered into by infants are absolutely void, as it is not for them, nor can it be for their benefit and advantage to subject themselves to a penalty, (See *Fisher v. Mowbray*, 8 East. 330), and that any action brought thereon may be defeated, by pleading the infancy of the obligee; it can hardly, therefore, (being in itself an invalid and nugatory instrument), do away with the responsibility of the infant on the contract for necessities. See *Edmond's case*, 3 Leon. 164, 4 Leon. 5. 80, 89.

Q. 72.—Can money deposited with a third party to be applied to an illegal purpose, be recovered at any, and if so, at what time?

A.—It may; for the law, so long as an illegal contract continues executory, implies from a person who has received money in furtherance of the execution of the contract, a promise to refund it, at any time before the happening of the event which is to decide the adventure, 66. See *Varney v. Hickman*, 17 L. J., C. P. 102, 5 C. B., 271.

Q. 73.—Give an instance of a surrender by act and operation of law.

A.—If a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such a new lease is of itself a surrender of the former lease; and is considered as a *surrender by act and operation of law*, 387.

Q. 74.—Is it a defence for the non-performance of an absolute contract, that such performance became impossible? Give your reasons.

A.—It has been laid down as a general rule or principle of law, that it would not be a defence; because the casualty or accident might have been provided against by the contract, 1123, 348, see *Barker v. Hodson*, 3 M. & S. 267.

SMITH'S MERCANTILE LAW.

Question 1.—Define what is meant by a common carrier: and what is meant by saying that at common law he is an insurer?

Answer—A common carrier is one who undertakes for hire, to transport from place to place the goods of such as choose to employ him; he is called an insurer because his entire faultlessness does not excuse him, and he is liable for damage done by accidental fire, or by a robbery, 284, 285. See *Covington v. Willan*, Gow, 115.

Q. 2.—Is money paid in pursuance of a verbal guaranty recoverable back? And give your reasons.

A.—The money so paid cannot be recovered back, because the statute merely enacts that it shall not be *sued upon*, but does not prevent the party taking advantage of any other remedy in his power, and so he is allowed to retain money paid under it, 439. See *Griffith v. Young*, 12 East, 513.

Q. 3.—Where a cheque for £50 was so carelessly drawn, that the agent who presented it, and who had previously filled it up, was enabled to introduce a figure of 8 before the figures 50, was the drawer of the check, or the banker who paid it in its altered state, held liable to bear the loss? Give your reasons.

A.—The drawer would be the sufferer; see *Young v. Grote*, 4 Bing. 253; because by his gross negligence, he facilitated the commission of the forgery, and will have to bear the loss thereby occasioned, 264.

Q. 4.—Goods are sold upon credit; nothing is said as to the time of the delivery of the goods: is the vendee entitled to the immediate possession of them?

A.—Yes, 484; see *Bloxam v. Sanders*, 4 B. & C., 941.

Q. .—Is the right of stoppage in transitu defeated by a *bond fide* sale of the goods to a third person by the vendee?

A.—The right of stoppage in transitu is not defeated by a second sale of the same goods, for the ordinary rule of law is, that the second vendee of a chattel cannot stand in a better situation than his own immediate vendor, 488, see *Dixon v. Yates*, 5 B. & Ad. 313.

Q. 6.—A vendor sends goods to the vendee by a common carrier, who loses them; what is the general rule as to the proper person to sue the carrier.

A.—When goods are forwarded in pursuance of an order, which binds the person giving it to receive the goods, as the property in them passes to that person by the delivery to the carrier, he is the proper plaintiff should they be lost. See *Dawes v. Peck*, 8 T R. 330. But it is otherwise when the property in the goods has not yet passed to the vendee, as where there is no writing to satisfy the Statute of Frauds, and the carrier was not of his selection. See *Coates v. Chaplin*, 3 Q. B. 483. 290, 291.

Q. 7.—What facts is the insured bound to communicate to the insurer? Is there any and what distinction in this respect, between misrepresentation and concealment?

A.—All material facts relating to the property insured must be communicated to the insurer. A misrepresentation of a material fact vitiates the policy; as to concealment, it is as fatal to the policy as misrepresentation, but it must be of a fact *material* to the just estimate of the risk, the main question respecting concealment being whether the fact concealed be a material one. 381, 382; see *Macdowal v. Fraser*, 1 Doug. 260; *Middlewood v. Blakes*, 7 T. R. 162; *Durrell v. Bederley*, 1 Holt. 238, Gibbs C. J.

Q. 8.—How many contracts of affreightment are there? what is meant by a general ship?

A.—Two, viz: contracts of affreightment by charter-party, and contracts for the conveyance of goods in a general ship, 292. A general ship is one which is engaged by the master and owners, with separate merchants, to carry their goods to the place of her destination, 298.

Q. 9.—Can there be such an acceptance of goods as will satisfy the Statute of Frauds, without precluding the purchaser from afterwards objecting to the quantity or quality?

A.—Yes; if the residue of the goods offered does not correspond with the sample, 471, see per Lord Campbell, 15 Q. B. 434.

Q. 10.—What is a total loss? In what case is the insured entitled to abandon—and what is the effect of abandonment?

A.—A total loss is of two kinds, a total loss *per se*, where the thing insured is utterly lost, and a loss which may be rendered a total loss by *abandonment*, which is a cession of whatever may be saved to the insurer, 371. The insured is entitled to abandon where the goods are *prima facie* totally lost, but there is some possibility, however remote, that they may yet reach their destina-

tion, or be rendered of some value, 373. The effect of an abandonment is to divest the property of the thing abandoned out of the insured, and vest it in the insurer for whom the former becomes a trustee, 376.

Q. 11.—If one partner sells the goods of the firm as his own, can the firm sue the vendee; if so, under what restrictions?

A.—The firm can sue the vendee, but under the restrictions that the buyer can set off any debt due to him from the single partner, 53. See *Skinner v. Stocks*, 4 B. & A. 337; *Rodwell v. Redge*, 1 Car. & P. 220.

Q. 12.—What is general average?

A.—Whenever damage or loss is incurred by any particular part of the ship or cargo, for the preservation of the rest, it is called *General average*: that is, the several persons interested in the ship, freight, and cargo, shall contribute their respective proportions to indemnify the owner of the particular part against the damage which has been incurred for the good of all, 319. See *Da Costa v. Newnham*, 2 T. R. 407; *Nesbit v. Lushington*, 4 T. R. 783.

Q. 13.—What information must a notice of dishonor give to the indorser of a bill or note so as to render him liable; and must such notice be in writing?

A.—The notice should ascertain the instrument, presentment, and dishonor, and may be by parol, 252—256. See *Mires v. Brown*, 11 M. & W. 372; *Houlditch v. Cauty*, 4 Bing. N. C. 411.

Q. 14.—What is requisite to render a parol sale of goods of the value of ten pounds valid?

A.—That the purchaser shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment, 468. See Stat. 29, Car. 2, Cap. 3, sec. 17.

Q. 15.—In what cases can one partner sue another; and in what cases can he not?

A.—One partner can sue another on a covenant by a deed, or a special undertaking not by deed, or for cash advanced before the partnership, or for work done for the firm before he became a member of it, or for money paid therefor after dissolution to a stranger who has had no notice of the dissolution, or where an account has been taken and a balance struck, or on a note or

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acceptance of his companion; but one partner cannot sue another for work and labor, or money expended on account of the partnership, 83.

Q. 16.—What is the difference between the contract of the acceptor and indorser of a bill of exchange.

A.—The acceptor undertakes to discharge the bill, and the indorser undertakes to the indorsee and every subsequent holder that the bill shall be discharged by the acceptor when it becomes due, 235; see *Allan v. Walker*, 2 M. & W. 317.

Q. 17.—To what extent does an affirmation at the time of the sale of a personal chattel operate as a warranty?

A.—It operates as a warranty if it appears to have been so intended, 490; see 3 T. R. 59, per Buller, J.

Q. 18.—What is requisite to a good tender?

A.—In the absence of directions of the creditor, there must, to constitute a legal tender of the debt, be an actual production and unconditional offer of the full sum due, unless the creditor dispense with it by a declaration that he will not accept it, and this tender must be of money, if beyond 40s., in gold, or what has been by Act of the Imperial Parliament rendered equivalent to money for that purpose, viz., notes of the Bank of England, payable to bearer on demand, which are a legal tender for any sum above five pounds, except at the bank itself and its branches. But although, strictly speaking, a legal tender must be made in money, if required, yet a tender of country bank notes, if not objected to on that account, will be sufficient, 510. See Arch. New C. L. Prac. 87, 2nd Edit.; *Hooper v. Stephens*, 4 Ad. & E. 71; 56 Geo. III., c. 68; 3 & 4 Will., IV., c. 6, s. 98. As to what moneys are a legal tender in Canada, we refer the student to Con. Stat. Can. Cap. 15.

Q. 19.—Is a sleeping partner, in retiring from the firm, bound to take any steps to free himself from future liability of the firm, and why?

A.—As a sleeping partner's name never appeared in the firm, of course it cannot be removed, but he would be chargeable by individuals who knew of his partnership at the time of entering into engagements with the firm; and to such persons he must give a proper notice of retirement, 48. *Heath v. Sansom*, 4 B. & Ad. 177; *Carter v. Whalley*, 1 B. & Ad. 11.

Q. 20.—In what respect does life assurance differ from any other contracts of insurance?

A.—A life policy, both in form and effect, is an absolute contract to pay a sum certain in the case of death. See *Dalby v. The India and London Life Assurance Company*, 18 Jur. 1024; whereas a marine or fire policy is only a contract of indemnity; 391, 392. See *Godsall v. Boldors*, 9 East. 72.

Q. 21.—Can there be, and if so, under what circumstances, a total loss of a vessel or goods while they retain their original form?

A.—There may be a capture, which, though *prima facie* a total loss, may be followed by a re-capture, which would invest the property in the assured, there may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination; under each of these circumstances there will be a total loss while the vessel or goods retain their original form, 373. See *Burr v. Gibson*, 3 M. & W. 390; also, *Knight v. Faith*, 15 Q. B. 649.

Q. 22.—How will a lien be affected by the fact that the person upon whose goods such lien is claimed, has a set off to an amount equal to the debt for which such lien is held? Give your reasons.

A.—The lien is not destroyed; for in that case there are two parties having mutual claims on one another; with this difference, that one has a security and the other has not; and in absence of special agreement to that effect, it would be obviously unjust to deprive the former of his advantage, 541. See *Pinnock v. Harrison*, 3 M. & W. 532; Judgment of Alderson, B., *Clark v. Fell*, 4 B. & Ad. 408.

Q. 23.—Is the right to bind the firm by negotiable instruments an incident of every partnership? If not, what is the limitation?

A.—No. For one attorney cannot bind his partner by a note, though given for the debt of the firm. See *Headley v. Bainbridge*, 8 Q. B. 316. Neither have partners in a farming or mining concern any such authority. See *Brown v. Byres*, 16 M. & W. 252. Such right is limited to partners in a trade strictly mercantile, or in a partnership where it is shewn to be necessary or usual. 43.

Q. 24.—Is there any, and what distinction between the liability to third persons of an agent remunerated out of the profits, and that of one remunerated by a sum proportioned to the profits?

A.—An agent remunerated out of the profits, becomes as to third persons a partner. See *Smith v. Watson*, 2 B. & C. 407; but an agent remunerated by a sum proportioned to the profits is not considered as a partner, 22. See Lord Eldon's expressions in *Ex parte Hamper*, 17 Ves. 112.

Q. 25.—Where a contract has been made by a broker, what is the written contract to satisfy the Statute of Frauds?

A.—The entry by him of the contract in his book, which he signs as their common agent, and sends the bought note to the buyer, and the sold note to the seller, which notes ought to be copies of the entry in the book, 480.

Q. 26.—Mention the cases in which the partner has, and those in which he has not, a right to bind the partnership.

A.—He has the right to bind the firm either by simple contract respecting the goods or business of the firm, or by negotiable instruments circulated in its behalf, to any person dealing *bona fide*. He cannot do so by *deeds*, unless he have express authority by deed for that purpose. 37. See *Vere v. Ashby*, 10 B. & C. 288; *Harrison v. Jackson*, 7 T. R. 207.

Q. 27.—To what extent is a bill of lading negotiable?

A.—Its negotiability only extends to the consignment of the property in the goods, and does not pass any rights under the original contract, 298—302.

Q. 28.—How may a partnership be created, and how dissolved?

A.—A partnership may be created by the mutual intervention of all the persons to be bound by it; and dissolved by the lapse of time, by mutual consent, by the decree of a Court of Equity. *A partnership at will may be dissolved at a moment's notice*, at the individual pleasure of any one partner, by the bankruptcy of one or all of the partners, by the outlawry, or attainder of treason or felony, or death of one of the partners, or marriage, if a female. 25, 26. See *McNeil v. Reid*, 9 Bing. 68; *Holland v. King*, 6 C. B. 727.

Q. 29.—What is the effect upon a creditor's remedy of taking a bill or note for a debt?

A.—It suspends his right of action until the maturity of the bill or note, 512. See *Helps v. Winterbottom*, 2 B. & Ad. 481.

Q. 30.—What is the extent of an attorney's lien, and upon what does it attach?

A.—An attorney has a lien for his general balance, and it attaches on papers of his clients, which come to his hands in the course of his professional employment, 538. See *Stevenson v. Blakelock*, 1 M. & Sel. 535.

Q. 31.—Is there any, and if so, what case, in which an endorsement can be for part of the sum secured by a bill or note?

A.—If the residue be paid, 231. See *Reid v. Furnival*, 1 C. & M. 538.

Q. 32.—Messrs. W. & Co.,—I will engage to pay you by half-past four to-day, fifty-six pounds, or bill that amount on H.—J. W. Is this a good guarantee? give your reasons.

A.—No; because there is no consideration expressed, nor can any be inferred from the tenor of the instrument, 445. See *Wain v. Walters*, 5 East, 10.

Q. 33.—Does the term endorsement of a bill or note include anything beyond the signature of the indorser?

A.—It includes delivery to the indorsee as holder, and therefore a denial of the indorsement includes a denial of such delivery, which is essential to entitle the party to sue, 236, see *Adams v. Jones*, 12 A. & E. 455.

Q. 34.—What is the criterion of a partnership between the partners themselves?

A.—The community of profits, 19, see *Gilpin v. Enderly*, 5 B. & Ald., 954.

Q. 35.—What words are necessary in an acceptance to render necessary the presentment of a bill of exchange at the place named in the acceptance?

A.—It must be drawn payable at the place named only, and not otherwise or elsewhere, 244. See U. C. Con. St. c. 42, ss. 5, 6; also Can. Con. St. 57, s. 4.

Q. 36.—What is the ordinary form of a contract of affreightment by a general ship?

A.—A Bill of Lading, 298. [As to the form of a bill of lading we would refer the student to page 299.]

Q. 37.—Are there any, and if so, what cases in which the concealment of facts within the knowledge of the insured, will not vitiate a policy?

A.—Yes; the concealment of facts not material to a just estimate of the risk; and, therefore, the main question respecting

concealment almost always is, whether the fact concealed be a material one, 382. See *Durrell v. Bederley*, 1 Holt, 283, Gibbs, C. J.

Q. 38.—Mention some cases in which two persons may be liable as partners to third persons, though as between themselves they are not partners?

A.—If a servant or agent stipulate for a share in the profits, and so entitle himself to an account of them, he becomes as to third persons, a partner, 21. Any person who lends his name to the credit of the firm and holds himself out to the world as a partner therein, is liable for its engagements; and that whether he have any real interest in the firm or not, 23.

Q. 39.—Are there any, and what exceptions to the rule, that a corporation cannot contract except under seal?

A.—A corporation in some cases may bind itself by promissory notes and bills of exchange; and there are other acts, mostly of a trifling nature, which every corporation may do without seal or even writing, such as the hiring of a common servant, 115. See *Bayley on Bills*, 6th ed. 70-79. *Yarborough v. Bank of England*, 16 East, 6, per Lord Ellenborough, C. J.

Q. 40.—Can a person advancing money on bottomry, recover the amount from the owners if the ship be lost? Give your reasons.

A.—No; because in consideration of the principal being in so great risk, such a loan was exempt from the late usury laws, and the lender of the money is entitled to receive a recompense far beyond the legal rate of interest, 401. See *Simonds v. Hodgson*, 3 B. & Ad. 50.

Q. 41.—By whom must a notice of dishonour be given to an indorser of a bill or note, so as to render him liable, and will such notice enure to the benefit of any other party than the one giving it?

A.—The holder, or some person entitled, or who, as a party to the bill, probably will be entitled, to call for payment or reimbursement, and a notice given by the holder or any other party; enures to the benefit of all who stand between that party and the person receiving it, 252. *Chapman v. Keane*, 3 Ad. & E. 193. *Wilson v. Swabey*, 1 Stark. 34.

Q. 42.—What is a guarantee?

A.—A guarantee is a promise to answer for the payment of some

debt, or the performance of some duty, in case of the failure of another person, who is himself in the first instance liable to such payment or performance, 438. See *Couturier v. Hastie*, 8 Exch. 40.

Q. 43.—What are the two ways in which a lien arises? Give instances.

A.—By special agreement, and by usage. The former depends upon the special terms of each individual contract: a livery-stable keeper is an instance of lien by special agreement. The latter depends upon implied terms of the contract: an attorney has a lien for a general balance on papers of his client, which come to his hands in the course of his professional employment; this is an instance of lien by usage. 536 et seq. *Forth v. Simpson*, 13 Q. B. 680; *Rushforth v. Hadfield*, 6 East, 519.

Q. 44.—Where a sale has been made to a broker dealing in his own name, but in reality as an agent, whom can the vendor treat as liable to him; and does the fact of the principal being a foreigner make any difference?

A.—He can elect, and treat either as liable; but if the principal be a foreigner he is not liable, and the agent must be looked to for payment, 151. See *Wilson v. Hart*, 7 Taunt. 295; also, *Thompson v. Davenport*, 1 Camp. 109.

Q. 45.—What parties to a promissory note stand respectively in the position of the drawer and acceptor of a bill of exchange?

A.—The indorser of a note as the drawer of a bill, the maker as the acceptor, and the indorsee as the payee, respectively, 209. See *Brown v. Harraden*, 4 T. R., 148.

Q. 46.—To what extent is an auctioneer the agent of the vendor and purchaser respectively, so as to make the contract binding within the Statute of Frauds?

A.—He is agent for the vendor only for the purpose of selling the article pursuant to the terms of the conditions of sale, and he is agent for the purchaser only for the purpose of signing a memorandum when required by the Statute of Frauds; his powers are so limited, that a previous agreement between the vendor and purchaser will not be altered by the printed conditions of sale, which are part of the contract of sale, 479.

Q. 47.—What is freight, and under what circumstances is it payable?

A.—The money paid for carriage of goods by sea. See Tomlin's Dic. tit. *Freight*. It denotes the price of *carriage*, not of *receiving goods to be carried*, and no freight becomes due and payable until the contract be performed, 312. See *Andrew v. Moorhouse*, 5 Taunt. 435; also *Crozier v. Smith*, 1 M. & Gr. 407.

Q. 48.—What is the Common Law liability of a Common Carrier?

A.—At Common Law he stands in the place of an insurer of the property intrusted to him, and is answerable for any loss or damage happening to it while in his custody, no matter by what cause occasioned, unless it were by the act of God, such as a tempest, or that of the king's enemies, 285.

Q. 49.—In what cases is the insured entitled to a return of the premium?

A.—Where the risk has not been run, the premium shall be returned; for the underwriter receives it for running the risk, and if he do not run the risk he ought not to retain it; and similarly where only part of the risk has been incurred, the insurer is entitled to the return of a proportionate part of the premium, 386. See *Routh v. Thompson*, 11 East, 428.

Q. 50.—Is a warranty made after a sale binding? Give your reasons.

A.—A warranty made after sale is void for want of consideration, 490. See 3 Bl. Com. 166; Finch, L. 189.

Q. 51.—Can a lien be retained for a debt, the remedy by action for which is barred by the Statute of Limitations? Give your reasons.

A.—It may; for the Statute of Limitations merely bars the remedy of action, and does not extinguish the right to the debt, and the debtor may avail himself of any remedy in his power, other than action, to obtain payment, 534.

Q. 52.—What is stoppage in transitu? And when does the right to stop arise; and how is it determined?

A.—Stoppage in transitu is a right which the vendor has to resume possession of goods on their way to the consignee, before actual delivery to him; and arises upon the consignee becoming bankrupt or insolvent during the transit of the goods, 524; it is determined upon the goods coming to the possession, actual or constructive, of the consignee, 529.

Q. 53.—Will the delivery of goods to an agent of the vendee appointed to convey them, deprive the vendor of his lien for the price, or of the right to stop in transitu, or either?

A.—The delivery of goods to an agent of the vendee appointed to convey them, will not put an end to the right to stop them in transitu, 531, *Holst v. Pounall*, 1 Esp. 240; but a lien is determined by delivery to such an agent, as the possession is thereby given up, 527, 540.

Q. 54.—Does the *bond fide* endorsement of the bill of lading affect the right to stop in transitu? and if so, how?

A.—Yes; such endorsement defeats the right to stop in transitu; but if the indorsee have not acted *bona fide*, (for instance if he knew that the consignee was insolvent, and assisted to defraud the consignor of the price of the goods,) he stands in the same place as the consignee, and the consignor retains his right to stop in transitu. 301.

Q. 55.—Does stoppage in transitu *revest* the property in the goods in the vendor?

A.—It would seem that it does not, and the vendee may still obtain the right to possession if he pays or tenders the price, 527. See *Milgate v. Keble*, 3 M. & Gr. 100; *Martindale v. Smith*, 1 Q. B. 389.

Q. 56.—Will such a *delivery* of goods as would be sufficient to support an action for goods sold and delivered, be sufficient to ratify a contract of sale within the Statute of Frauds? State the difference.

A.—It would not; the difference is this,—on the one hand there need only be a *delivery* of the *possession*, in order to sustain a count for goods sold and delivered; and on the other hand, there must be an *acceptance* of the possession in order to satisfy the Statute of Frauds, 478, note.

Q. 57.—What are the respective rights of debtor and creditor as to the appropriation of sums paid by the former?

A.—Where a debtor, owing several sums to one creditor, makes a payment, it is in his option at the time of payment, to have the payment appropriated to the discharge of any particular sum; if he fail to make such appropriation, the creditor may apply it in his option, 520. If both fail to make any appropriation, the law will

appropriate as may be most beneficial for the debtor. Story, Equity Juris., § 459, c.

Q. 58.—What are the implied warranties in a marine policy?

A.—The implied warranties are: 1. Not to deviate unnecessarily from the usual course of the voyage; 2. Seaworthiness of the vessel insured; 3. That the insured will use reasonable diligence to guard against the risks covered by the policy, 363.

Q. 59.—“I promise to pay to A. or order £50 on demand, in goods:” is this a good promissory note? Give your reasons.

A.—No; a promissory note must be for the payment of money alone, 211. See *Russell v. Powell*, 14 M. & W. 418, also *Bolton v. King*, 4 R. & Ad. 619, per Patterson, J.

Q. 60.—What is requisite to a valid sale of goods over the value of ten pounds? Does it make any difference whether the goods are in existence at the time of the sale?

A.—It is requisite that the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized. A distinction was formerly taken between cases in which the thing contracted for was in existence and capable of delivery at the time of the contract, and in cases that it was necessary that something should be done in order to render it capable of delivery; the former cases were universally held to be within the act; but the decisions on the question whether the latter were so, were not very consistent. However, by the Statute 9 Geo. IV., c. 14, s. 5, it is enacted that the 17 sec. Stat. of Frauds shall extend to all contracts for the sale of goods to the value of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured or provided or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery, 468, 469. See Con. Stat U. C., cap. 45, sec. 11. See, also, *Smith v. Surman*, 9 B. & C. 561; *Elliott v. Pybus*, 10 Bing. 512, for remarks of Tindal, C. J., on this Statute.

Q. 61.—What is the effect of mentioning no time for payment in a bill or note?

A.—The bill or note is payable upon demand, 217. See *Whitlock v. Underwood*, 2 B. & C. 157.

Q. 62.—What are general and particular liens, and how are they respectively looked upon by the law?

A.—General liens are claimed in respect of a general balance of account, and Particular liens are where persons claim to retain the goods in respect of which the debt arises; the former is looked upon by the law *strictly*, whilst the latter are *favoured*, 534. See *per Heath, J.*, in 3 B. & P. 494.

Q. 63.—What is the distinction between a voyage and a time policy as regards any implied warranty of sea-worthiness?

A.—Where a vessel is insured for a *voyage* there is an implied warranty of sea-worthiness at the commencement of the risk, that is, at the port where the assurance is "*at and from*" at the beginning of a voyage; when it is "*from*" a port, 366; see judgment of Baron Parke, 16 Q. B. 156: with respect to a *time policy*, which is usually effected when the ship is at sea, or in a position where the owner could have no means of knowing her state or complying with such a condition, no warranty of sea-worthiness can be implied, 369.

Q. 64.—What is the distinction between a factor and broker, and what is a *del credere* agent?

A.—The former are entrusted with the possession as well as the disposal of property, whilst the latter are employed to contract about it without being put in possession, 121. A *del credere* agent is a factor, who, for an additional premium beyond the usual commission, sells goods on credit, and becomes bound to warrant the solvency of the purchaser, 129. See *McKenzie v. Scott*, 6 Bro. P. C. 280, Tomlin's Ed.

Q. 65.—Is there any, and if so, what difference between a warranty made on the sale of a specific chattel and of unascertained goods?

A.—Upon the sale of a specific chattel there is an implied warranty only that it actually exists and is of the description given. Upon sale of unascertained goods there is an implied warranty that they are merchantable, or that they are suitable for the purpose for which they are stated to be required. 489. See *Jones v. Bright*, 5 Bing. 533, also *Stanciliffe v. Clarke*. 7 Exch. 439.

Q. 66.—Will the discharge of an indorser of a bill or note dis-

charge any other, and if so, what parties to the instrument? Give your reasons.

A.—If the holder discharge or give time to a prior indorser, he will discharge those subsequent to him; see *Hall v. Cole*, 4 Ad. & E. 577: because a subsequent indorser stands in the light of a surety for the prior ones, 279. See observations of Tindal, C. J., in *Bassett v. Dodgin*, 9 Bing. 653, and *Isaac v. Daniel*, 8 Q. B. 500.

Q. 67.—When a forged cheque is paid by a banker, has the banker any remedy against his customer, whose signature has been forged? Is there any exception to this rule?

A.—The banker will have no remedy against his customer whose signature has been forged, (see *Johnson v. Windle*, 3 Bing. N. C. 225), unless the customer have by his gross negligence, facilitated the commission of forgery; in which case he (the customer) will have to bear the loss thereby occasioned, 264.

Q. 68.—What is the distinction between the common law liability of a carrier of passengers and goods?

A.—A carrier of passengers does not warrant the safety of the passengers, at all events; but only that, so far as human care and foresight will go, their safe conveyance will be provided for. See *Sharp v. Grey*, 9 Bing. 457. But a carrier of goods is answerable for any loss or damage happening to the goods while in his custody, no matter by what cause occasioned, unless it were by the act of God, or that of the king's enemies. 284, 285.

Q. 69.—Can there be a binding verbal agreement to renew a bill or note? Will it make any difference in the validity of such agreement whether it was contemporaneous with the executing of the instrument or not? Give your reasons.

A.—There may, after a bill or note has been made, be a binding verbal promise for valuable consideration to renew it when due; see *Gibbon v. Scott*, 2 Stark, 286; but such promise must not be contemporaneous with the drawing of the bill or note, because it would incorporate with a written contract an incongruous parol condition, which is contrary to first principles, 274. See *Hoare v. Graham*, 3 Camp. 57, and *Woodbridge v. Spooner*, 3 B. & Ald. 233.

Q. 70.—Has one partner in the firm of attorneys an authority to bind his co-partner by a negotiable instrument? Give your reasons.

A.—An attorney cannot bind his partner by a bill or note, though given for the debt of the firm; see *Headley v. Bainbridge*, 3 Q. B. 316: for partners in a particular business not strictly mercantile, have *prima facie* no authority by law to bind each other by bills or notes, 4). See *Dickinson v. Valpy*, 10 B. & C. 128.

Q. 71.—What is the general effect upon a creditor's claim of his taking his debtor's bill or note for the amount; and what would be the effect of the creditor negotiating such bill or note? Will it make any difference in the effect of his so negotiating it, whether he does or does not render himself liable on it?

A.—The taking of the debtor's bill or note is an agreement to give him credit for the time it has to run, and suspend the creditor's remedy in the meanwhile. If the creditor negotiates the bill or note for value, and without rendering himself liable, it will operate as payment, though dishonored. See *Bunney v. Poyntz*, 4 B. & Ad. 568. But if the creditor negotiates the bill or note so as to render himself personally liable upon it, in that case it will not operate as payment if dishonored. 512, 514. See *Miles v. Gorton*, 4 Tyr. 295; 2 C. & M. 504, and *Tarleton v. Allhusen*, 2 A. & E. 32.

Q. 72.—Can a partnership be dissolved as between the partners, without being dissolved as to third persons? And if so, when does this happen?

A.—A partnership, though dissolved as between the partners, can exist as to third persons, if they do not remove their names from the firm, and give proper notice of the dissolution; for until the world is duly advertised thereof, they continue to hold themselves out as still in business, and will be still responsible to third persons for their engagements, 27, 47. See *Jones v. Shears*, 4 A. & E. 832.

Q. 73.—For what purpose is it necessary to give notice of a dissolution of a partnership? And how should such notice be given, and to whom?

A.—For the purpose of preventing all danger of the liability of a partner for the future acts of his companions. To persons who have not dealt with the firm, notice in the *Gazette* will be sufficient. See *Wrightson v. Pullen*, 1 Stark, 375. To persons who have dealt with the firm, express notice ought to be given, and is

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usually done by circular letters. See *Kirwan v. Kirwan*, 2 C. & M. 617, and *Jenkins v. Blizzard*, 1 Stark, 418. 48.

Q. 74.—What may disentitle the agent to remuneration for his services.

A.—If the object of his employment be illegal, (see *Cope v. Rowlands*, 2 M. & W. 157); if by his misconduct as by neglect to keep an account, (see *White v. Lady Lincoln*, 8 Ves. 371); or if gross negligence or want of skill on his part prevent his employer from deriving any benefit from his services, (see *White v. Chapman*, 1 Stark, 113; or if he betray his trust and act adversely to his principal, (see *Hurst v. Holding*, 3 Taunt. 32), he will not be entitled to remuneration for his services, 132.

Q. 75.—In the ordinary case of a sale at auction, what is the writing to satisfy the Statute of Frauds?

A.—The entry of the purchaser's name in the sale book opposite the lot for which he is the highest bidder, by the auctioneer or the auctioneer's clerk, at the time of the sale, is a writing sufficient to satisfy the statute; and the signature is sufficient, because either the auctioneer, or his clerk, who makes the entry, is the lawfully authorized agent of both vendor and purchaser for that purpose, 479. See *Hinde v. Whitehouse*, 7 East. 558; *Bird v. Boulter*, 4 B. & Ad. 443; also *Emmerson v. Heelis*, 2 Taunt. 38.

Q. 76.—To what limitations is the right of an undisclosed principal to sue on a contract made by his agent subject?

A.—If the undisclosed principal sue, the defendant has the same rights against him as he would have had against the agent if he had really been the principal: as the right to set off any claim he may have against the agent personally, 163. *Taylor v. Kymer*, 3 B. & Ad. 334, per Lord Tenterden, C. J.

Q. 77.—Upon what does the negotiability of bills of exchange and promissory notes respectively depend?

A.—The negotiability of bills of exchange and promissory notes depends upon their being drawn or indorsed, payable to either order or bearer, 205. See *Chitty on Bills*, 9th ed., 159, 196; also *Grant v. Vaughan*, 3 Burr. 1516.

The following answer may also be given to this question:

The negotiability of bills of exchange depends upon the custom of merchants; and that of promissory notes upon the statute 3 & 4 Anne, c. 9. See *Byles on Bills*, 2, 4.

Q. 78.—What is an indorsement in full, in blank, a restrictive indorsement, and an indorsement "*sans recours*," and what is the effect of such indorsements respectively?

A.—An indorsement in full, is one which mentions the name of the party in whose favor the indorsement is made; an indorsement in blank, is one which does not mention such name. The effect of such indorsements is: a bill or note indorsed in full must be indorsed again by the person to whom it was so indorsed in order to render it transferable; an indorsement in blank is transferable by mere delivery. A restrictive indorsement is one worded so as to restrain the transferability of the instrument; an indorsement *sans recours* is where the indorser, by adding those words, or the like, to his indorsement, in effect merely passes the property in the instrument without incurring any personal liability upon it. 230, 231. See Chitty on Bills, 9th ed., 228, 229.

Q. 79.—What is a charter party, and a bill of lading?

A.—A charter party is a contract, (frequently by deed, but not necessarily so), "by which an entire ship or some principal part thereof is let to a merchant for the conveyance of goods upon a "determined voyage to one or more places," 292. A bill of lading is a memorandum signed by the master of a general ship, acknowledging the receipt of goods which he undertakes to carry in his ship, and deliver to a consignee named, or to the person to whom such bill of lading shall be transferred, 292, 298; see Tomlin's *L w Dic.*, tit. *Bill of Lading*; also *Grant v. Murray*, 10 C. B. 665.

Q. 80.—Is a verbal acceptance of a bill of exchange binding on the acceptor? Does this depend upon common law or statute?

A.—In case of a foreign bill the acceptance may by common law be either verbal or in writing; *Lumley v. Palmer*, 1000; *Sproatt v. Matthews*, 1 T. R. 182; but by the Statute 1 & 2 Geo. 4, c. 78, s. 2, the acceptance of an inland bill must be in writing on the bill. 237. See *Con. Stat. U. C. c. 42, s. 7*.

Q. 81.—To what extent is an auctioneer an agent of the purchaser, to bind him, where the Statute of Frauds requires a signed memorandum? Does this depend upon who is suing on the contract?

A.—He is agent only for the purpose of signing such memorandum. This depends upon who is suing, for if the auctioneer sues,

he cannot avail himself of his character of agent for the defendant. 479.

Q. 82.—When may notice of dishonour to the drawer of a bill be dispensed with?

A.—Where the holder has endeavoured to give notice, but was unable to do so by reason of the fault or neglect of the drawer; as for instance, where the drawer fails to have any one at his place of business to receive such notice; where the drawer has absconded; where the drawer with full knowledge of his position, partly liquidates or promises to liquidate the bill; and where the bill has been accepted for the accommodation of the drawer, and he is fully aware that it will be dishonoured; 260, 261. See *Sharp v. Bailey*, 9 B. & C. 44; *Rogers v. Stephens*, 2 T. R. 713.

Q. 83.—Mention some of the peculiarities of the contract of hiring and service.

A.—Where the contract is under a special agreement, the terms of that agreement must be observed; if there be no special agreement, but the hiring is a general one without mention of time, it is considered to be for a year certain; if the servant continue in employment beyond that year, a contract for a second year is implied; in case of menial or domestic servants, the contract is, by general custom dissoluble by a month's warning, or payment of a month's wages; but a general hiring at (*e. g.*) weekly wages is a weekly hiring, unless there are some circumstances to shew a contrary intention; if the master dismiss his servant (hired generally) without cause, the latter will have a right to wages up to the expiration of the year, while on the other hand if the servant quit his master causelessly, he will be entitled to no wages; nor will he be so if dismissed before the expiration of his term of service for misconduct; 407—409.

Q. 84.—What are the requisites of a guarantee?

A.—To comply with the 4th sec. Stat. Frauds (29, Chas. 2, c. 3, s. 4), a guarantee must be in writing and signed by the party to be charged, or his lawful authorised agent; otherwise it cannot be sued upon, 438; and there must be a good consideration; which if it be a past consideration must have been *moved by an antecedent request* from the guarantor, 445, 446.

Q. 85.—In what contracts must a consideration exist and be proved, and in what is it presumed?

A.—Simple contracts require a consideration to be proved; an exception to the rules regarding this, is made in the case of Bills and Notes which are personal *prima facie* to be founded upon good consideration; in contracts by deed a consideration is presumed; 267.

Q. 86.—How far is a pledge by a factor of his principal's goods valid?

A.—In such case the pledgee shall acquire such right, title, or interest as, and no further or other than, was possessed by the factor or agent at the time of the deposit or pledge, 144. See *Fletcher v. Heath*, 7 B. & C. 517.

Q. 87.—How does the right to stop in transitu differ from a lien?

A.—The right to stop in transitu differs from a lien in this—that the former arises when the actual possession of the goods is given up, but a lien simply affects the property in possession, and is lost when the goods go out of the hands of him who has the lien, 527, 524.

Q. 88.—State some of the grounds on which a surety's liability will be discharged?

A.—If the creditor discharge the principal, or enter into any agreement with him by which the sureties situation is altered for the worse, or which would render a proceeding against the surety a fraud upon the principal, or to substitute a new agreement instead of that for which the surety was responsible, he (the surety) will be discharged. 45%.

Q. 89.—What is the difference between law and equity as regards the indorsement of a bill of lading by way of pledge, on the vendor's right to stop in transitu?

A.—The indorsement of a bill of lading by way of pledge, defeats the *legal* right to stop in transitu; but in equity, the vendor may, by giving notice to the pledgee, resume his former interest in the goods, subject to the pledgee's claim, and will be entitled to the residue of their proceeds after the pledgee's demand has been satisfied out of them, or to the goods themselves, if it be satisfied *aliunde*, (In re *Westrinthus*, 5 B. & Ad. 817,) notwithstanding the pledgee may have other demands against the consignee, 532.

Q. 90.—What are the two instruments used in contracts of affreightment?

A.—A *charter party*, and a *bill of lading*; the former being that by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places; the latter being when the master and owners of a ship engage with separate merchants to convey their goods to the place of their destination, in a general ship, 292, 298.

Q. 91.—Can one partner bind another by negotiable instruments, submission to arbitration, or deed; or by either or which of them?

A.—One partner of a mercantile firm can bind the firm to the payment of negotiable instruments drawn, indorsed, or accepted in the common name. *Swan v. Steele*, 7 East, 210. One partner cannot bind the firm by a submission to arbitration, without some authority beyond that which flows from the general relation of partnership. *Stead v. Salt*, 10 Moore, 395. One partner cannot bind the firm by deed, unless he has express authority by deed for that purpose. *Harrison v. Jackson*, 7 T. R., 207. 37, 39.

Q. 92.—What is the meaning and result of *Barratry*? Give an example?

A.—*Barratry* is derived from an Italian word, which signifies to cheat; it is any act of the master or mariners of a vessel of a criminal nature, or which is grossly negligent, tending to their own benefit to the prejudice of the owners of the ship, and without their consent or privity; and the result is, that if by reason of such an act, the subject matter of insurance is detained, lost or forfeited, the insured will be entitled to recover for a loss of *barratry*, 349, 350. See *Lockyer v. Wheeler*, 1 T. R. 252. Wilful deviation in fraud of the owner is an example, (*Vallojo v. Wheeler*, Cowp. 143,) 349.

Q. 93.—Define "a general agent," and "a particular agent," and state the rule as to the authority of each to bind the principal.

A.—A general agent is one who is intrusted with all his principal's business in some specific line, of some specific kind. A particular agent is one employed specially for some one special purpose. *Smith on Contracts*, 305. A general agent has a general implied authority to bind his principal in the ordinary and usual scope of the business he is deputed to transact, even if he go beyond his actual authority; but a particular agent can only bind

the principal by his acts within the limit of his authority. 138 et seq. See Smith on Contracts, 2nd ed., 304, et seq.

BYLES ON BILLS.

Question 1.—Define a promissory note and bill of exchange respectively?

Answer.—A promissory note is an absolute promise in writing, signed but not sealed, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer, 4. A bill of exchange is a written order from A. to B., directing B. to pay C. a sum of money therein named, 1.

Q. 2.—What is the meaning of Protest, and of what bills or notes is Protest necessary or allowable?

A.—A Protest is a solemn declaration in writing by a notary, stating that payment or acceptance has been demanded and refused, and the reason, if any, assigned, and that the bill (or note) is therefore protested, (201,) or, in other words, it is a minute non-acceptance or non-payment, accompanied by a solemn declaration on the part of the holder against any loss to be sustained thereby. Smith Mer. L., 5 ed., 257. Protest is necessary in the case of foreign bills, (200,) and allowable on inland bills (204); it is unnecessary in the case of foreign or inland promissory notes.

Q. 3.—What are the requisites of notice of dishonour?

A.—As regards form, no particular form of notice is necessary, all that is necessary is by actual notification, written or verbal, to apprise the party to be made liable, of the dishonour of the instrument, and that he is expected to pay it. (*Sed quære*, see Smith's Mer. L. 256.) The bill or note in question must be carefully described, 213, 216. As to the mode of transmitting, it may be personal, or may be by letter transmitted by post, or by a special messenger, who, however, must deliver it at the least as soon as it would have arrived by post; in the case of a foreign bill it should be sent by the first regular ship bound for the place to which it is to be sent: 218, 220. As to place, it should be sent to the place of business or residence of the party for whom it is designed, 220. As regards time, it should be given before action, and

within a reasonable time after dishonour, depending on the facts of each particular case. It has been held that where parties live at different places, a notice may be transmitted on the day following the day of dishonour, or by the next post thereafter; where parties live in the same town it should be transmitted so as to be received on the day after dishonour. Each person who receives notice has a reasonable time to notify any person whom he desires to make liable to himself. See *passim* 221—225. (As regards the persons by whom and to whom such notice should be given, see 225—230.)

Q. 4.—If the last of the three days of grace fall on a legal holiday, when is the bill or note payable; and under what law?

A.—On the preceding day; 162. See *Tassell v. Lewis*, 1 *Ld. Raym.* 743; *Imp. Stats.* 39 & 40 *Geo.* 3, c. 42; 7 & 8 *Geo.* 4, c. 15. Our law on this point is quite different from the English law; by *U. C. Con. Stat. cap.* 42, s. 20, and *Can. Con. Stat. cap.* 57, s. 5, "all bills of exchange and promissory notes, whereof the third day of grace falls upon any non-judicial day, shall become due and payable, and be presented for payment upon the judicial day next after such third day of grace."

Q. 5.—If no time for payment of a bill or note be expressed on the face of it, when is it payable?

A.—On demand, 165. See *Whitlock v. Underwood*, 2 *B. & C.* 157.

Q. 6.—May a bill be accepted after the time at which it is made payable on the face of it, has elapsed; and if so, when does it become payable?

A.—Yes; and becomes payable on demand, 146.

Q. 7.—In what particulars do bills and promissory notes differ from other simple contracts?

A.—In two particulars—first, that they are assignable; secondly, that consideration will be presumed till the contrary appear, 2, 92.

Q. 8.—What is requisite to make a bill or note negotiable?

A.—It must contain a direction or promise to pay to the order of the payee, or to bearer, 113.

Q. 9.—What are the modes of transferring bills and notes?

A.—If the instrument be payable to order, it is transferable by indorsement; but if payable to bearer, it is transferable by mere delivery, 114.

Q. 10.—What are the different kinds of indorsements?

A.—Indorsements are of two kinds—an indorsement in blank, or, as it is sometimes termed, a blank indorsement, made by the mere signature of the endorser, and an indorsement in full, or a special indorsement, naming the indorsee, 114, 115.

Q. 11.—What is the meaning of an acceptance *supra protest*; and what is the undertaking of the acceptor *supra protest*?

A.—When acceptance is refused, and the bill is protested for non-acceptance, or when it is protested for better security, any person may accept it *supra protest* for the honour of the drawer or of any one of the indorsers. See *Vandewall v. Tyrrell*, M & M. 87. The undertaking of the acceptor *supra protest*, is not an absolute engagement to pay at all events, but only a collateral conditional engagement to pay if the drawee do not. 206—208.

Q. 12.—What is the effect on the liabilities of the endorser if the holder of a promissory note bind himself to give time to the maker; and what general principle of law is applicable to such a case?

A.—The indorser is discharged, unless the agreement giving time be made with his consent, or contain a stipulation that the holder shall, in case of default, have *judgment* at a period as early as he could have obtained judgment if hostile proceedings had continued. The parties to the bill stand as principal and sureties. 189—193. See *Story's Equity Jurisprudence*, § 492.

Q. 13.—State the effect of a note of hand at common law.

A.—At common law no note of hand was transferable, and no action could be maintained, even by the payee, on a promissory note as an instrument, but it was only evidence of a debt, 4.

Q. 14.—By what act were promissory notes made indorsable and transferable?

A.—3 & 4 Anne, c. 9, s. 4.

Q. 15.—If a note be made payable to the maker or order, and be indorsed by him in blank, what is the effect? And what is the effect if it be indorsed by him specially?

A.—A note made payable to the maker or order, and indorsed by him in blank, becomes payable to bearer. See *Browne v. De Winton*, 17 L. J. 282 C. P. And if specially indorsed, it is payable to the indorsee or order. See *Gay v. Lander*, 17 L. J. 286 C. P. 5, 114, 115.

Q. 16.—Is a note good when made by several persons payable “to our and each of our order,” and indorsed by one only of the makers?

A.—Yes; 5. See *Absolon v. Marks*, 11 Q. B. 19.

Q. 17.—May a note be made payable by instalments; and if so are the days of grace allowed on each instalment? And are presentment and notice of dishonour required when each instalment becomes due? and do laches as to one instalment discharge an indorser as to that instalment, or as to the whole note? And may such note be indorsed over for less than the entire sum due on it?

A.—A note may be made payable by instalments. Days of grace are allowed on each instalment. See *Orrige v. Sherborn*, 11 M. & W. 374. Presentment and notice of dishonour are required when each instalment becomes due; but laches as to one instalment in ordinary cases only discharges the indorser as to that one. Such a note cannot be indorsed over for less than the entire sum due upon it. 5.

Q. 18.—Is a note made payable to a married woman good; and if so, can she transfer it by indorsement.

A.—The note is good, but she cannot transfer it during coverture, 50. See *Mason v. Morgan*, 2 Ad. & El. 30.

Q. 19.—Within what time must an action be brought on a bill or note to save the Statute of Limitations?

A.—Within six years after the cause of action accrues, or after the removal of any disability under which the person entitled to the action then labours, 270.

Q. 20.—Do writings in the following forms constitute Promissory Notes,—viz: I acknowledge myself to be indebted to A. in £100, to be paid on demand for value received.” “I have received the sum of £20, which I borrowed from you; and I have to be accountable for the same sum, with interest.” “I undertake to pay to Mr. Robert Jarvis the sum of £8, for a suit of clothes ordered by Daniel Page.” “Gentlemen, I have received the books which, together with the costs overpaid on the settlement of your account, amounts to £80, which sum I will pay within two years from this date, Your obed’t serv’t., A. B.”

A.—The first form mentioned was held to be a good note, the words “to be paid,” amounting to a promise to pay; see *Brooke v. Elbiens*, 2 M. & W. 74. The second was held not to be a

promissory note; see *Home v. Redfearn*, 4 Bing. N. C., 433. The third was held to be a guarantee and not a note; see *Jarvis v. Wilkins*, 7 M. & W. 410. The fourth was held to be a promissory note; see *Wheatley v. Williams*, 1 M. & W. 533. 8 and note (g).

Q. 21.—Can an action be sustained at law on a promissory note which has been lost? and if yes, on what terms?

A.—An action cannot be sustained at law on a negotiable promissory note which has been lost, 299; but “it is conceived” that an action will lie on a note, not negotiable, either on the note or on the consideration, 300.

By our stat. 19 V. c. 43, s. 292—U. C. Con. Stat. c. 42, s. 33, in case any action be founded upon a lost negotiable instrument, upon an indemnity to the satisfaction of the Court or a Judge, or of any officer of the Court to whom such indemnity is referred, being given to the defendant against the claims of any other person upon him in respect of such instrument, the Court or a Judge may order that such loss shall not be set up as a defence in such action.

Q. 22.—If a note be made payable at a bank, is presentment at the bank necessary in order to charge the indorser?

A.—No; unless the note be made payable there “and not otherwise or elsewhere,” 166. This is the law in Upper Canada, U. C. Con. St., c. 42, s. 5, but in Lower Canada it is different, Con. Stat., c. 57, s. 4.

Q. 23.—When is a plea of accommodation a good defence, and what should it state?

A.—It is a good defence in an action between the original parties: *Story Pro. Notes*, §§ 190, 191. It must be pleaded specially, and must state affirmatively the circumstances relating to the consideration, 339, 341. *Easton v. Pratchett*, 1 C. M. & R. 798.

Q. 24.—Is it or not, necessary that the acceptance of an inland bill should be in writing.

A.—It is necessary by Imp. stat. 1 & 2 Geo. IV., ch. 78, sec. 2, that the acceptance should be in writing, 117. [U. C. Con. Stat., ch. 42, sec. 7, contains a similar enactment.]

Q. 25.—What is an inland bill, and what a foreign bill?

A.—An inland bill is such as passes between parties residing in the same country, and a foreign bill is such as passes from one country to another, 313. See *Tomlin's L. Dic.*, tit. *Bills of Exchange*.

Q. 26.—In the case of the death of the maker of a note, what presentment is necessary in order to charge the indorser?

A.—Presentment must be made to his personal representatives; and, if he have none, then at his house, 159. See Chit. on Bills, 9th ed. 357.

Q. 27.—What is the effect of endorsing a bill *sans recours*?

A.—The person indorsing incurs no personal responsibility, 117.

Q. 28.—Does payment of a bill at maturity by any person except the acceptor, destroy its negotiability?

A.—No, 132, 174.

Q. 29.—If a note be made payable to A. B., or bearer, and A. B., indorses the note, has the holder any, and if any, what remedy against A. B., and what is necessary to make him liable?

A.—In such a case the indorser incurs the same liabilities as the endorser of a negotiable note payable to order; Story Pro. Notes, § 132: therefore the holder has a remedy against A. B., as in ordinary cases, and the like proceedings must be taken to make him liable.

Q. 30.—What is the effect of the consideration of a bill partly legal and partly illegal?

A.—The instrument is vitiated altogether 111. See Scott v. Gilmore, 3 Taunt. 226.

Q. 31.—Can a bill be either drawn or accepted for the payment of a sum of money on condition? Is there any distinction in this respect between drawing and acceptance? state the reason.

A.—A bill cannot be drawn payable conditionally, but may be so accepted, 70-72, 149. The reason why this distinction is made and acceptance on a condition allowed, is because to refuse to permit such acceptance would affect trade, as for example, a bill may be drawn upon a factor before he has an opportunity to dispose of the goods consigned to him in respect of which the bill is drawn; see Smith v. Abbott, Stra. 1152.

Q. 32.—What parties to a bill are entitled to notice of dishonor, and within what time?

A.—All parties to whom the holder of the bill means to resort for payment, 226; see Chit. on Bills, 496. It must be given within a reasonable time after dishonour, depending upon the particular circumstances of each case, 221. (See answer to question 3.)

Q. 33.—In what case will delay to present a bank cheque for payment discharge the drawer?

A.—If the drawer sustain actual prejudice, as by the failure of the banker, he will be discharged, 14, 15. See *Rolinson v. Hawkesford*, 9 Q. B. 52.

Q. 34.—According to the rate of interest, in which country, is the interest on a foreign bill to be calculated, against the acceptor and drawer respectively?

A.—As against the acceptor, interest is calculated according to the rate of interest at the place where the bill is made payable; as against the drawer, according to the rate allowed at the place where the bill was drawn. Ch. on Bills, 10th ed., 439.

Q. 35.—Are bills payable at sight or on demand, or either of them, entitled to days of grace?

A.—Whether days of grace are allowed on bills payable at sight seems yet undecided, (see *Dickson v. Nuttall*, 6 C. & P. 320); but the weight of authority has been considered to incline in favor of such an allowance. Days of grace are not allowed on bills payable on demand. 162.

Q. 36.—Is want of consideration a good defence against a *bond fide* holder of a bill, who has taken it when overdue?

A.—After a bill is due it comes disgraced to the indorsee, and it is his duty to make enquiries concerning it. If he takes it, though he gives full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be incumbered. 129.

Q. 37.—In what cases would the drawer of a bill accepted for his accommodation be entitled to notice of dishonor?

A.—If at any time during the drawing of the bill and its presentment and dishonor, the drawee had some effects of the drawer in his hands, though insufficient to pay the amount, he will nevertheless be entitled to notice of dishonor, and the laches of the holder will discharge him from liability, 233; see *Orr v. Magennis*, 7 East, 359; Chit. on Bills, 328. Also, in general, though the drawer had no effects in the hands of the drawee, yet, if he had any reasonable expectation that the bill would be honored, he is entitled to notice of dishonor; as if he have assigned goods to the drawer, though, in fact, they never came to hand; or have accepted bills for him; 324. *Legge v. Thorpe*, 12 East, 171.

Q. 38.—Give an instance of a restrictive indorsement ; what is its effect ?

A.—“The within must be credited to A. B.,” was held to be a restrictive indorsement. So—“Pay to A. B. for my use ;” or “Pay to A. only.” A holder who takes a bill, the circulation of which is restrained by a restrictive indorsement, cannot sue the drawer or acceptor on it, but holds the bill or money raised by him, as the trustee of the restraining party, and is liable to refund the bill or money received upon it to the party making the restrictive indorsement. 121.

Q. 39.—What is the effect of a blank left in a bill or note. for the name of the payee ?

A.—A *bonâ fide* holder may fill it up with his own name, and recover against the drawer or maker ; but to charge an acceptor, the holder so inserting his name must shew that he has the authority of the drawer to do so, 62. Crutchley v. Clarence, 2 M. & Sel. 90 ; Crutchley v. Mann, 5 Taunt. 529.

Q. 40.—Is a debt due from a third party a good consideration for a bill of exchange payable at a future period ? Give your reasons.

A.—It is ; because it is an agreement to give time to the original debtor, and that indulgence to him is a consideration to the maker, 96, and note (p). Popplewell v. Wilson, 1 Stra. 264 ; Coombs v. Ingram, 4 D. & R. 211.

Q. 41.—If a cheque altered in amount, in fraud of the drawer, is paid by a banker, will the drawer, in all or any, and what cases, be liable to the banker for the amount ?

A.—The drawer is not in general liable, but must bear the loss if any act of his own has facilitated or given occasion to the alteration, 17. Hall v. Fuller, 5 B. & C. 750 ; Young v. Grote, 4 Bing. 253.

Q. 42.—Mention some dealings with the acceptor, by the holder of a bill of exchange, which will discharge the indorser.

A.—Any transaction by which the acceptor is discharged, operates as a discharge to the indorser, as also does any agreement by which the right of action against the acceptor is suspended, (Kennard v. Knott, 4 M. & G. 474), or the time of payment postponed. Such are—a release to the acceptor ; a covenant or valid agreement not to sue him ; a release in law to the acceptor, as if he be made

executor of the payee; the taking of a new bill from the acceptor. 191, et seq.

Q. 43.—What amounts to a payment of a bill of exchange; by whom must it be made, and when, so as finally to extinguish it?

A.—Payment must be made in money (70), by or on behalf of the acceptor (174), at any time within business hours of the day it falls due, 175.

Q. 44.—To what extent is an agreement to renew a bill or note written on a separate piece of paper binding between the original and subsequent parties respectively?

A.—A written agreement between the original parties on a distinct paper, to renew, is binding between the original parties; but it will not restrain the operation of the bill or note if it be collateral. See *Bowerbranch v. Montiero*, 4 Taunt. 844; *Webb v. Spice*, 19 L. J. 34 Q. B. It is not binding as to subsequent parties unless they have notice of the existence of a written agreement. See *Leeds v. Lancashire*, 2 Camp. 205; *Chit. on Bills*, 142. 75, 76.

Q. 45.—Upon what grounds, and to what extent, does a promise by an indorser to pay a note or bill after it becomes due, dispense with the proof of notice of dishonor?

A.—Upon the grounds that every man is taken to know the law. A promise to pay an overdue note or bill by the indorser dispenses with proof of notice of dishonor to the extent that the defendant has the burden of proving the want of notice and his ignorance of it, for unless he were ignorant of it the want of notice would be immaterial. 237. See *Fletcher v. Froggatt*, 2 C. & P. 569.

Q. 46.—Is it necessary to present a bill or note payable at sight or on demand, or either of them, for the purpose of charging the maker or acceptor?

A.—It is necessary to present a bill or note payable at sight *Dickson v. Nuttall*, 1 C. M. & R. 307; but it is not necessary to present a bill or note payable on demand, for an action upon it is a sufficient demand. 270. *Rumball v. Ball*, 10 Mees. 1.

Q. 47.—If a bill or note be indorsed to a previous indorser, has he any remedy against the intermediate parties? Give your reasons.

A.—He has no remedy, for they would have their remedy over

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against him, and the result of the actions would be to place the parties in precisely the same situation as before any action at all, 119. *Bishop v. Hayward*, 4 T. R. 470.

Q. 48.—Where a note or bill is given to a single woman, who afterwards marries, who should indorse, and who should sue upon it during coverture?

A.—The husband should indorse it. See *Connor v. Martin*, 3 Wilson, 5; 1 Stra. 516, S. C. Husband and wife should join in action upon it. 49.

Q. 49.—If a bill is dishonored by non-acceptance, and afterwards by non-payment, from which time does the Statute of Limitations commence to run? Give your reasons.

A.—From the time of the refusal to accept, see *Whitehead v. Walker*, 9 M. & W. 506; because the Statute of Limitations begins to run on a bill or note as well as on any other contract, from the time that the action first accrued to the party. See *Emery v. Day*, 1 C. M. & R. 245. 272—274.

Q. 50.—Who is the principal debtor in a bill of exchange? Does the fact that the bill was an accommodation one make any difference in this *at law* as regards other persons?

A.—The acceptor is the principal debtor. It was formerly held that where a bill was accepted without consideration for the accommodation of the drawer, the drawer was to be considered the principal debtor; but this distinction has since been overruled, (see *Fenton v. Pocock*, 5 Taunt. 192), and now in courts of Law, the acceptor, in all cases of accommodation bills as well as others, is considered as the principal debtor. See *Price v. Edmunds*, 10 B. & C. 578. 190, 191.

Q. 51.—When a bill or note is transferred without indorsement, in payment for goods, is the party transferring it, as a general rule, liable for the price of such goods, if the bill or note is not paid? Give your reasons.

A.—No; for such a transaction is held to be a sale of the bill or note by the party transferring it, and a purchase of the instrument, with all risks of the transferee, 123, 307; see *Fen v. Harrison*, 3 T. R. 759.

Q. 52.—What is the effect upon the liability under the original instrument, of a new bill being taken in renewal of the original one?

A.—Where a bill is renewed, holding the original bill and taking the substituted one, operates as a suspension of the debt until the renewal bill is at maturity, when, if that is not paid, the liability of parties on the original bill revives, 185, 307. *Bishop v. Rowe*, 3 M. & Sel. 362. The taking of a new bill from the acceptor, payable at a future day, without the consent of the endorsers, discharges them, 194. *Gould v. Robson*, 8 East, 576.

Q. 53.—Is there any exception to the rule that a party taking a note overdue takes it subject to all its equities? Does the position of his assignor make any difference in this respect?

A.—An original absence of consideration is not one of those equities which attach on the instrument and defeat the title of the indorsee for value. See *Charles v. Marsden*, 1 Taunt. 224. An indorsee of an overdue note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters; so the indorsee of an overdue note is not liable to a set off due from the payee to the maker. See *Burrows v. Moss*, 10 B. & C. 558. An assignee of an overdue note is not affected by an infirmity in the title of an original or antecedent party, if his immediate assignor could have maintained an action. See *Chalmers v. Lanion*, 1 Camp. 383. 129, 130.

Q. 54.—Will an indorser be entitled to notice of dishonor when it can be shewn that he knew the bill would be dishonored?

A.—He will be entitled to notice, because notice does not mean mere knowledge, but an actual notification, 218. *Burgh v. Legge*, 5 M. & W., 418.

Q. 55.—Is there any, and what distinction between the liability of the drawee of a bill of exchange, and a banker on whom a cheque is drawn?

A.—Generally speaking the drawee is not liable till acceptance; but a banker having in his hands effects of his customer, is an exception to this rule; he is bound within a reasonable time after he has received the money, to pay his customer's cheques; 13. See *Marzetti v. Williams*, 1 B. & Ad. 415.

Q. 56.—If a bill obtained by fraud be indorsed by A. to B., B. having notice of the fraud, but A. being an innocent holder, can B. recover on the bill? Give your reasons.

A.—Yes; as soon as the note comes to the hands of an innocent

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holder, the fraud is removed and it is a *bond fide* and subsisting note, 103. Ch. on Bills, 10 ed. 50.

Q. 57.—If a bill is accepted in one country payable in another, is the contract to be construed by the law of the country in which it is accepted, or of that in which it is payable? Give your reasons.

A.—It must be construed by the law of the country in which it is payable, for "where a contract is made in one country to be performed in another, the country where the contract is to be performed is deemed the country in which it is made," and "the interpretation of a contract, is to be governed by the laws of the country where it is made," 315, 317. But a *general* acceptance being a contract to pay everywhere, is governed by the law of the place where it is given, for it is payable there as well as in every other place, 317.

Q. 58.—Is a plea of tender, by the acceptor after the bill has become due, but before action brought, good? Give your reasons.

A.—It is insufficient; because it admits a breach of contract, and in strictness a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract, 176. See *Hulme v. Peploe*, 8 East, 168. Ch. on bills, 10th ed., 275.

Q. 59.—What is the effect of the gift of a bill or note, first, as to the donee's right to sue the donor upon it; second, as to his right to retain it against the donor; third, as to his right to sue other parties upon it?

A.—First—donee cannot sue the donor upon it. Second—donor cannot recover the bill back. Third—donee has a right to sue other parties prior to himself. 95.

Q. 60.—If the bill be not transferable, or payable to order, and not indorsed, what is the effect of a gift of it?

A.—It vests the legal property in the paper in the donee, who, however must recover from prior parties in the donor's name, 95.

Q. 61.—Are cross acceptances for mutual accommodation to each other sufficient considerations?

A.—Yes: 95. See *Rose v. Sims*, 1 B. & Ad. 521.

Q. 62.—Is a judgment debt a good consideration for a note payable at a future day? Give your reasons.

A.—Yes; for it imports an agreement on the part of the judgment creditor to suspend proceedings on the judgment till the

maturity of the note, 97. See *Baker v. Walker*, 14 M. & W. 465.

Q. 63.—Upon what principle does the discharge of a drawer and indorser for want of notice of dishonor respectively depend?

A.—The drawer is injured if he has not had due notice, because otherwise he might have immediately withdrawn his effects from the hands of the drawee; and if the indorser has not had timely notice, the remedy against the parties liable to him is rendered more precarious, 230.

Q. 64.—What is the effect in an action by the holder of a bill against the acceptor, of the bill having been paid by the drawer?

A.—The holder cannot recover against the acceptor, 132, 133.

Q. 65.—What are the essential requisites of a bill of exchange?

A.—That it be a written order, for the payment of money only, of which the sum must be certain, and that such payment be absolute and not contingent either as to amount, event, fund, or person. 1, 70, et seq. See *Chit. on bills*, 132.

Q. 66.—What warranty results from the transfer or endorsement of a bill or note?

A.—A transfer by delivery warrants the genuineness of signature, 125. Each indorsement is a warranty of the validity of the prior indorsements, 174, note (k).

Q. 67.—When are the various kinds of bills to be presented for acceptance and payment respectively?

A.—Presentment for acceptance should be made within a reasonable time, depending on the circumstances of each case, and is necessary in the case of a bill drawn payable at sight, or a certain period thereafter, but not in the case of a bill payable at a certain period after date, 139. A bill payable at a time specified, must be presented for payment on the last day of grace, that is, in England, (as also in Canada and the United States of America) on the third day after the day specified—unless that day be a holiday when it falls due on the day before; (as in the United States; in Canada, on the day after; *Con. Stat.*, c. 57, s. 5.) A bill payable at a certain period after sight, or at usance, is also to be presented on the last day of grace. A bill payable on demand should be presented within a reasonable time, as also a bill in which no time of payment is specified; and on these no days of grace are allowed. It is doubtful whether days of grace are to be

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allowed on bills payable at sight, but the weight of authority is in favor of such an allowance. In reckoning the time when a bill, payable a certain number of days after date, or after sight, falls due, those days are reckoned exclusively of the day on which the bill is drawn or accepted, and the day on which it falls due. 159, et seq.

Q. 68.—When may presentment be excused?

A.—Illness or other reasonable cause not attributable to the misconduct of the holder will excuse presentment, 141.

Q. 69.—What is the effect of the alteration of a bill or note?

A.—The instrument becomes void, whether the alteration be made by a party or a stranger, 253; *Davidson v. Cooper*, 11 M. & W. 778; 13 M. & W. 343.

Q. 70.—What are the five principal rules established in the law of England with respect to the conflict of laws, which arise in cases of bills of exchange?

A.—1. Every contract is, in general, to be regulated by the laws of the country in which it is made; 2. Where a contract is made in one country to be performed in another, it is deemed to be made in the country where it is to be performed; 3. Contracts immoral or contrary to the laws of nations, or injurious to British public interests, though valid where made, will not be enforced on behalf of a guilty party in an English Court; 4. One country will not regard the revenue laws of another; 5. The remedy is to be governed by the law of the country where that remedy is sought. 315, 316.

Q. 71.—What is a qualified acceptance, and how may it be evidenced?

A.—It is an acceptance with a condition or qualification annexed thereto; and must be evidenced by writing, 150. See *Hoare v. Graham*, 3 Camp. 57.

Q. 72.—Can a corporation be sued in assumpsit on a promissory note?

A.—A corporation is liable to be sued in that form of action, on negotiable instruments, wherever it has power to issue them, 52. See *Murray v. East India Company*, 5 B. & Ald. 204.

Q. 73.—What considerations are illegal?

A.—Considerations illegal at common law are such as violate the rules of religion or morality, and such as contravene public

policy. Those illegal by statute are such as usurious,* gaming, and stock-jobbing considerations. 103, 111.

Q. 74.—Can a bill be endorsed after the death of the payee? and if so by whom?

A.—It can, by the payee's personal representatives, 40. See *Murray v. East I. Co.*, 5 B. & Al. 204; *Rawlinson v. Stone*, 3 Wils. 1.

Q. 75.—As to what parties is presentment unnecessary so as to charge them?

A.—A presentment for payment is not necessary in order to charge a man who guarantees the due payment of a bill or note, 158. *Hitchcock v. Humphrey*, 5 M. & G. 559.

Q. 76.—How far is the title of the transferee affected by his negligence?

A.—An honest transferee has a good title, unless his gross negligence induce the jury to find fraud, 128. See *Goodman v. Harvey*, 4 Ad. & El. 870.

Q. 77.—When does the acceptance of a bill or note operate as a satisfaction, and when not?

A.—Where a bill or note, on which some person other than the debtor is liable, is expressly given and accepted in full satisfaction and discharge, the liability of the debtor for the original debt will not revive on the dishonour of the substituted instrument, therefore it operates as a satisfaction. See *Hardman v. Bellhouse*, 9 M. & W. 596. But if it be taken generally on account, or in renewal, the original liability of the debtor revives on its dishonour. See *Kerslake v. Morgan*, 5 T. R. 513. 184.

Q. 78.—How far is a renewal bill affected by the character of the consideration for the original bill?

A.—If a bill upon an illegal consideration be renewed, the renewal bill is also void; see *Chapman v. Black*, 2 B. & Ald. 588; unless the amount be reduced by excluding so much of the consideration for the original bill as was illegal; 111.

Q. 79.—If the holder of a bill agrees to renew it when it becomes due, is he bound to do so?

A.—A written contemporaneous agreement, unless it be collateral,

*Note.—The usury laws are abolished in effect, by U. C. Stat. 22 Vic., c. 85.

—or a subsequent verbal agreement founded upon good consideration,—to renew, is binding as between the original parties, 76.

Q. 80.—When is a renewal bill a satisfaction of the original bill?

A.—When it is expressly given and accepted in full satisfaction of the whole of the former bill, 184, 185. See *Lumley v. Musgrave*, 4 Bing. N. C. 9: see answer to 78 *ante*.

Q. 81.—Is a bill or note earnest, or part payment, within the seventeenth section of the Statute of Frauds, so as to obviate the necessity of a written contract?

A.—It is, 308.

Q. 82.—What is the effect of taking a bill or note in payment of goods, as regards the vendor's lien on such goods?

A.—In general it will determine the lien. See *Horncastle v. Farran*, 3 B. & Ald. 497. But if the bill or note, remaining in the vendors' hands, be dishonoured, the goods not being delivered, the lien will revive. *New v. Swain*, 1 Dans. & Ll. 193. 307.

Q. 83.—When does the taking of a bill operate as a waiver of a lien?

A.—When the vendor takes the vendee's bill or note and negotiates it, it is a waiver of the lien, 307. See *Bunney v. Poyntz*, 4 B. & Ad., 568.

Q. 84.—What is the effect of an infant drawing and indorsing bills?

A.—He may convey a title to the indorsee, so that the indorsee can sue the acceptor and all other parties except the infant himself, 46. See *Drayton v. Dale*, 2 B. & C. 299.

Q. 85.—Is a date in general essential to the validity of a bill or note? If not, when will it be considered as dated?

A.—Date is not essential; if not dated it will be considered as dated at the time it was made; 57. See *Giles v. Bourn*, 6 M. & Sel. 73.

Q. 86.—What is presumptive evidence of payment of a bill or note?

A.—A bill or note, overdue, having been in circulation and being in the hands of the acceptor or maker, is presumed to be paid, 180. A receipt upon the back of a bill or note is also presumptive evidence of payment, 181. *Pfiel v. Vanbatenberg*, 2 Camp. 439. Also the production of a cheque from the defendant on his banker

endorsed by the plaintiff, unless there have been several transactions between the parties, without evidence to connect the delivery of the cheque with the payment in question, 180. See *Egg v. Barnett*, 3 Esp. 196. *Aubert v. Walsh*, 4 Taunt. 293. A lapse of twenty years from the date of a promissory note payable on demand, (*Dreffield v. Creed*, 5 Esp. 52.) unless during that period the holder was an alien enemy, 180, 286

Q. 87.—What is the general right acquired by the transferee of a bill, and what exceptions exist thereto?

A.—He acquires a right of action upon the bill against all the parties whose names are thereon, and that notwithstanding any equity existing between the original parties, except where he is a *mala fide* holder, or takes the bill overdue, 119.

Q. 88.—Suppose the instrument be so worded that it is doubtful whether it is a bill or note, what is the consequence?

A.—The holder has the option of treating the instrument as either a bill or note, 68. *Edis v. Bury*, 6 B. & C. 433.

Q. 89.—Whom can the acceptor for honour sue?

A.—The party for whose honor he accepts, and all whom that party might have sued, 209.

Q. 90.—Where money is paid into the bank to the joint credit of several persons not partners, to whose cheque may the money be paid out?

A.—It cannot be paid out except to the joint cheque of all, 18.

Q. 91.—Is evidence admissible to shew that the true relation of the parties to a bill or note, is different from their apparent position on the same?

A.—It is admissible in an action by the drawer of an accommodation bill against the acceptor, or by the payee of an accommodation note against the maker, but not as between other parties. *Chit. on Bills*, 10th ed. 204. When a note is on its face joint, or joint and several, it would seem that evidence to shew that one maker is surety for the other, is inadmissible at law, if the question arise between the creditor and the surety; but such evidence has been received, 6.

Q. 92.—If the time of payment of a note is uncertain, does that vitiate it?

A.—It does vitiate it, 59, 72; *Richard v. Richards*, 2 B. & Ad. 447; but it is valid if it be made payable upon an event, which

though uncertain, must inevitably happen some time or other, *id certum est quod certum reddi potest*, 72. *Cooke v. Colehan*, 2 Stra. 1217. If no time for payment be mentioned, it is a good note, payable on demand, 165, 58.

Q. 93.—Distinguish between a guarantee and a promissory note?

A.—A guarantee requires an express consideration to support it, and is not transferable; nor can the action or proof be upon it, as in the case of the endorsement of a note, but it must be on a special agreement, or the consideration which existed before, or passed at the time of the transaction. See Ch. on bills, 248, 250. *Ex parte Harrison*, 2 Cox, 172.

STORY ON PARTNERSHIP.

Question 1.—What constitutes a Partnership as between the parties, and what a Partnership as to third persons?

Answer.—Community of interest in the whole property, business, and responsibilities of the Partnership, and of the profits arising from the Partnership business, constitutes a partnership as between the parties: §§ 1, 30. As regards third parties a partnership may be constituted—First, where there is no community of interest in the capital stock, by the parties agreeing to have a community of interest or participation in the profit and loss of the business or adventure as principals, either indefinitely or in fixed proportions; secondly, where there is, strictly speaking, no capital stock, by the contribution of labour, skill and industry by each in the business as principals, and the sharing of the profit and loss thereof in like manner; thirdly, by the sharing of profit between the parties as principals, where the loss, if any occurs beyond the profit, is to be borne by one only; fourthly, where the parties are not in reality partners, by their holding themselves out as partners, or by the party sought to be charged, holding himself out as a partner, to third persons who give credit accordingly; and fifthly, by one of the parties receiving an annuity out of the profits or as a part thereof. § 54. *Smith Merc. L. chap. 2, s. 1. Montagu L. of Part. 2 ed. 2, 7, 10. Waugh v. Carver*, 2 H. Bl. 235. *Hoare v. Dawes*, 1 Doug. 371. "Community of profit" is said to be the "true criterion" to judge what is a partnership. *Coope v. Eyre*, 1 H. Bl. 37.

Q. 2.—What are the principal duties which, without any express stipulation between them, the law imposes on all Partners?

A.—The law implies an obligation on partners of mutual confidence in one another, and mutual good faith towards one another; zealous attention to and co-operation in the business and objects of the concern; strict conformance to stipulations contained in the articles of partnership, and to the objects of the business; to abstain from acts in any way adverse to the partnership interests, or tending to the benefit of one partner to the exclusion of the firm; not to engage in any other business or speculation which must necessarily deprive the partnership of the use of a portion of the common stock; exactness in keeping accounts of the partnership business, and readiness to submit them to inspection; and the exercise by each partner of a sound and reasonable discretion for the benefit of the concern to the best of his knowledge and skill. §§ 169–186.

Q. 3.—Under what circumstances does the admission of a Partner bind his Copartner?

A.—An admission made in any partnership transaction, by one partner, will bind the firm. § 107. *Lucos v. De la Cour*, 1 Maule and Sel. 250. Whether such an admission if made after the dissolution of the partnership, will be binding, seems doubtful: Mr. Story contends that it will not, §§323, *et seq*; in England admissions so made respecting transactions which have taken place during the continuance of the partnership, have been held good, but not those relating to transactions occurring subsequent to the dissolution; *Wood v. Braddick*, 1 Taunt. 104. *Lacy v. McNeil*, 4 Dowl. and Ry. 7.

Q. 4.—What acts of one Partner bind his Copartner before and after a dissolution respectively?

A.—Before dissolution one partner may bind the firm by any simple contract entered into on behalf of the firm in the ordinary trade and business thereof, or by doing any acts which are incident or appropriate to such trade or business, according to the common course and usages thereof, § 102; *Anon.* 12 Mod. R. 446; or even by a simple contract made in the name of the partnership, with a person who has no notice that the party is dealing on his sole account, *Swan v. Steele*, 7 East, 210. After dissolution one partner can bind the others by acts done consistent with the duty

incumbent on them all, of winding up the concern, as acts for the purpose of making good outstanding engagements, settling accounts and converting the property of the partnership. §§ 322, 325, 328. Collyer Partn. §§ 118, 546. *Peacock v. Peacock*, 16 Ves. 57.

Q. 5.—State what may *ipso facto* determine a Partnership after it is formed; and what are sufficient grounds for obtaining a decree in equity for a dissolution?

A.—A partnership may be determined *ipso facto* by effluxion of the time for which it is created, § 278; by the extinction of the thing which constituted the sole subject matter of the partnership, § 280; by the completion or accomplishment of the entire business for which the partnership was formed, § 280; by change of the state or condition of one of the parties, as marriage of a female partner, §§ 303 *et seq*; by the transfer of the property or share of one or more partners by their own act, or by act of law, as an execution and levy by the Sheriff, §§ 307, 311; by the bankruptcy or insolvency of one of the partners, § 313; by a public war between the countries of which the partners are respectively subjects, § 315; by the death of one partner, § 317; by an award directing a dissolution, § 299; Collyer Partn. §§ 108—120. Equity will decree dissolution on the ground that the partnership has been entered into by one partner through gross fraud or gross misrepresentations of another, § 282; that there is gross misconduct, fraud or violation of duty by one partner, §§ 287, 288; on the ground of impracticability of carrying on the undertaking for which the partnership is formed, either from inability on the part of one or all of the partners; or from the undertaking itself being in its character visionary or its operations absolutely impracticable, § 290; a decree of dissolution may also be made when one partner has been long absent in the public service, or upon mere personal or private objects, or has changed his domicile to another country, or has voluntarily engaged in some other incompatible pursuit, § 298. See 1 Rose 69. *Wray v. Hutchinson*, 2 Mylne & K. 238. *Baring v. Dix*, 1 Cox, 213. *Jones v. Noy*, 2 Milne & K. 126. *Waters v. Taylor*, 2 Ves. & B. 299.

Q. 6.—What are the rights of the Partners *inter se* upon the determination of their Partnership?

A.—The determination of the partnership puts an end to the joint powers and authorities of all the partners any farther to

employ the partnership property, funds or credit in the business and trade thereof, or to make any new contracts binding on the partnership, or to do any act inconsistent with the duty, which the dissolution makes incumbent upon them all, of winding up the affairs of the partnership; but for that purpose the partnership is held to continue. §§ 322, 328. *Crawshay v. Maule*, 1 Swanst. 507. *Wilson v. Greenwood*, *ib.* 480. Upon dissolution each partner has a right to require the partnership funds to be applied in settling the liabilities of the firm, and then to have his share of the residue, § 326. *Ex parte Williams* 11 Ves. 3, 5. *Ex parte Ruffin*, 7 Ves. 126. Upon dissolution by bankruptcy of one partner, the bankrupt has no power to bind the partnership in any way, his assignee standing in his place. § 337. Upon dissolution by the death of one of them, the personal representative of the deceased becomes a tenant in common with the survivors, of all the partnership property and effects in possession. § 346. Upon dissolution by bankruptcy, the solvent partners continue to carry on the business at their risk, and the assignee of the bankrupt has his option to a share of the profits, if any; and so also in the case of dissolution by the death of one partner, his representative may call upon the survivors for an account of profits subsequent to the death. §§ 341, 343. *Crawshay v. Collins*, 15 Ves. 218. *Hammond v. Douglas*, 5 Ves. 539. Upon taking an account between the partners, each is of course, chargeable with debts due by him to the firm, with interest, and all the profits of the partnership which he has received, § 348. If no particular mode of taking an account between them be pointed out by the partnership articles, a court of Equity will take the last stated account as conclusive up to the time when it is made, unless gross error or fraud be shewn in it. § 349.

Q. 7.—Give a definition of Partnership, and illustrate the rule that Partnership is a *voluntary contract*.

A.—Partnership is a voluntary contract between two or more competent persons to place their money, effects, labour and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them, § 2. *Collyer Partn.* § 3. Partnership is founded upon the voluntary consent of the parties as contradistinguished from the relations which may arise between parties by

mere operation of law; to illustrate,—joint heirs and joint legatees have a community of interest, but, wanting the voluntary consent, (their mutual relations arising by operation of law,) there is no partnership between them. § 3.

Q. 8.—Where the same person is a partner in two different firms, can one of such firms sue the other? Will this rule affect the rights of the holder of a note or bill made by one of such firms to the other and endorsed over? Give your reasons?

A.—One firm cannot sue the other, for all the partners of one firm must be plaintiffs and all the partners of the other firm defendants, in which case the common member would be both plaintiff and defendant upon the same record, which cannot be, for a man cannot sue himself. § 221. *Mainwaring v. Newman*, 2 B. & P. 120. *Bosanquet v. Wray*, 6 Taunt. 597. *Chitty Contr.* 2 ed. 227. But an action upon such a note may be brought by the endorsee, as each member of both firms is liable to him, either as maker or endorser, irrespective of their rights *inter se*. See *Jones v. Yates*, 5 B. & C. 532.

Q. 9.—Is the right of one partner to bind another by negotiable instruments a legal incident to the existence of a partnership? If so, in what cases does it not exist?

A.—The right of one partner to bind the firm by negotiable instruments is incident to the partnership, unless it be inconsistent with its objects, as when it is not formed for any commercial pursuit, for example a mining or farming partnership. §§ 102, 126. *Swan v. Steele*, 7 East, 210. *Dickinson v. Valpy*, 10 B. and Cres. 128.

Q. 10.—Is the absence of any express stipulation between the parties conclusive on the question, whether a partnership is at will or for a definite period?

A.—Where there is no express stipulation as to the duration of the partnership, it will be presumed to be a partnership at will, § 84; but this is not conclusive, for its intended duration may be ascertained by implications or presumptions arising from the acts and conduct of the parties and other accompanying circumstances. § 277. *Crawshay v. Maule*, 1 Swanst. 508.

Q. 11.—Where there are running accounts between a firm and a customer, how will the ordinary rule of law with regard to appropriation of payments by such customer, affect the liability of a retiring partner?

A.—In such case, if the balance at the time of the retirement be against the firm, the retiring partner will be liable for such balance; but if the account be continued, this balance will be diminished by every payment made by the new firm, unless such payment be appropriated to the discharge of any specific item, because where no specific appropriation is made, every payment is applied to the first item on the debit side of the account; but if the new firm, making payments, neglect to appropriate them to discharge of the balance, the creditor may appropriate as he pleases, even to the prejudice of the retiring partner. § 157. *Devaynes v. Noble*, Clayton's case. 1 Mer. 572. *Collyer Partn.* §§ 548, 633.

Q. 12.—To what extent can the sheriff seize partnership property upon a judgment against an individual partner for his separate debt? and what is the position of a purchaser from the sheriff in such a case?

A.—The sheriff, on an execution against one partner for his separate debt, can seize the interest of that partner in the property of the partnership, subject to the prior rights and liens of the other partners and the joint creditors therein: upon sale, the purchaser of such property becomes tenant in common with the other partners, and he may file a bill against them, or they may file a bill against him, to ascertain the interest of the judgment debtor, which he has purchased. §§ 261, 263. *Chapman v. Koops*, 3 B. & P. 289.

Q. 13.—Is the rule that a release by one partner of a debt due to the firm an exception to the doctrine that one partner has no authority to bind his co-partners by deed? If not, upon what principle does the effect of such release depend?

A.—The rule that one partner may bind the others by deed does not extend to a release. *Collyer Partn.* § 468. The reason why a release by one binds all is, that as the creditor may lawfully pay his debt to one of them, he ought to be able to obtain a discharge upon due payment. § 115. *Collyer Partn.* § 468. *Stead v. Salt*, 10 Moore 393. 3 Bing. 103.

Q. 14.—Is there any, and if so, what case in which a retiring partner, after notice, will be held liable for the new debts of the new firm?

A.—~~He~~ is liable where, upon the insolvency of the firm, known

to all the partners, they fraudulently permit him to withdraw a portion of the partnership funds out of the reach of the joint creditors of the new firm, for the purpose of cheating or defrauding the latter; in such case the fraud vitiates the whole transaction, and the retiring partner will be held liable to the full extent of the funds so fraudulently withdrawn. § 163. *Anderson v. Maltby*, 2 Ves. 244.

Q. 15.—What is the effect of the death of one partner, and what is the position as regards the partnership property of his personal representatives?

A.—The partnership is thereby dissolved. §§ 317, 843. *Crawford v. Hamilton*, 3 Madd. 254. *Crawshay v. Maule*, 1 Swans. 509. (As to the effect of such dissolution as regards the rights of the parties *inter se*, see answer to Q. 6.) Upon dissolution by death, the creditors have no remedy at law for their debts, against the representatives of the deceased, but only against the survivors; but in Equity the assets of the deceased partner are liable. § 361. *Collyer Partn.* § 576. *Richards v. Heather*, 1 B. & Ald. 29. *Devaynes v. Noble*, Slesch's case, 1 Meriv. 539. *Wilkinson v. Henderson*, 1 Mylne & K. 582, 588. Upon the death of one partner his personal representatives become tenants in common with the survivor of the partnership property. § 346.

Q. 16.—What is the presumption, in the absence of precise stipulation, as to the proportion in which each partner is to share in the profits; and does the amount which each has contributed affect this presumption?

A.—They are presumed to share equally, *Farrar v. Beswick*, 1 Mood. & R. 527; and this is the presumption even if they have contributed unequally. § 24.

Q. 17.—Mention some instances in which a firm may be liable for the tort of a single partner?

A.—The firm will be liable for the torts of one partner arising in the course of the business; as fraud committed by one partner in the course of the business, *Rapp v. Latham*, 2 B. & Ald. 795; or a libel published by one of a firm of booksellers, see *Rex v. Almon*, 5 Burr. 2686.

Q. 18.—Distinguish between the right of partners in partnership property and—1st, of that of joint tenants; 2nd, of tenants in common in the property held under their respective tenures.

A.—As regards the right in the property; 1st, partnership differs from joint tenancy in that joint tenants cannot dispose of the interest of each other in the joint property, but each has the sole power of disposing of his own interest therein; whereas in cases of partnership, each partner is not only a joint owner with the others of the partnership property, but also has full power to dispose of the entire right of all the partners therein, for the purposes of the partnership, and in the name of the firm, and in that there is no exclusive right in the property acquired by survivorship in cases of partnership, as there is in joint tenancy, where the survivor becomes entitled to the share of the deceased; § 90; 2nd, partnership differs from tenancy in common, in that tenants in common have a separate and distinct, though undivided interest, possessing "the whole of an undivided moiety of the property, and not an undivided moiety of the whole property;" whereas partners are joint owners of the whole; and in that a tenant in common can dispose only of his own share, but, as stated above, each partner may, for, and in the name of the firm, dispose of the entirety; § 90.

Q. 19.—Where joint tenants of property agree to embark the joint property in trade, are their interests those of partners or joint tenants?

A.—Their interests become those of partners, § 90. See *Hall v. Digby*. 4 Bro. Parl. R. 577.

Q. 20.—If an infant either actually becomes, or holds himself out as a partner, what will, in either case, be his position on arriving at full age with regard to parties dealing with the firm?

A.—Upon arriving at full age he may elect to continue the partnership, and will then be held liable as a partner; if he wish to discontinue the partnership, (as he of course may do,) he must within a reasonable time notify all parties dealing with the firm of his disaffirmance of the partnership, otherwise he will be taken to have confirmed it, and will be bound by subsequent contracts made on the credit of the partnership. § 7. *Goode v. Harrison*. 5 B. & Ald. 147.

Q. 21.—In what ways can a partnership be dissolved?

A.—By the act or agreement or consent of the parties; or of some one or more of them, in the case of a partnership at will; §§ 265, 269; *Fetherstonehaugh v. Fenwick*, 17 Ves. 298; by the decree of a Court of Equity, (see more fully, answer to Q. 5;) and

by operation of law; (as to cases in which this may occur, see answer to Q. 5.)

Q. 22.—What is the position, with regard to the partnership, of the personal representatives of a deceased partner?

A.—The personal representatives of a deceased partner have a right, (through the intervention and by the assistance of a Court of Equity,) to have an account taken, and the affairs of the firm properly wound up, and the partnership effects properly applied to the discharge of the partnership liabilities, and then to have the residue divided among the partners, according to their respective shares. §§ 342 *et seq.* They have also a right to have an account of the profits subsequent to the death, if the survivors have continued to carry on the business, and to a share therein in due proportion, but are not liable to any losses incurred by the survivors in so continuing the business. § 343.—*Ex parte Ruffin*, 6 Ves. 126. *Crawshay v. Collins*, 13 Ves. 218.

WILLIAMS ON REAL PROPERTY.

(*Mem.*—The statutes referred to in the answers given to the questions upon this book are Imperial Statutes, unless named as Provincial Statutes.)

Question 1.—Distinguish between a joint-tenancy and a tenancy in common?

Answer.—A joint tenancy is where lands are held by two or more persons as one single owner, such persons having unity of possession, unity of interest, unity of title and unity of time of the commencement of such title, 109. Tenancy in common is where the several owners have a unity of possession, but a distinct and several title to their shares, which shares may be in various proportions, 113. Upon the death of one joint tenant the indivisibility of estate is such that the survivor holds the whole estate as if he had been always sole owner, 111; but upon the death of a tenant in common his share descends to the heir as in ordinary cases. See 2 Bl. Com. 180, 191.

Q. 2.—What are co-parceners?

A.—Coparceners are two or more persons who together form one heir, 81.

Note.—U. C. Stat. 14 & 15 V. c. 6, s. 16—U. C. Con. St. c. 82, s. 38, enacts that co-heirs shall take as tenants in common.

Q. 3.—A. seised in fee, dies intestate, leaving two daughters, B. and C. : B. conveys all her estate in the lands to D. in fee. What is the quality of B.'s estate before and after the conveyance ?

A.—B. and C. before conveyance hold the fee as co-parceners ; after conveyance, C. and D. hold as tenants in common. See 82, 113.

Q. 4.—What are the rights of a husband in the real estate of his wife ?

A.—The husband is entitled to the whole of the rents and profits which may arise from his wife's land, and acquire a freehold estate therein during the continuance of the coverture, 182. If he survive his wife he will, in case he has had inheritable issue by her, be entitled to a life estate as tenant by courtesy in lands of which she was solely seised in fee simple or in fee tail, in possession, 185.

Note.—But see U. C. St. c. 73. (*see Cont Stat 1872 n 3*)

Q. 5.—In what instances can a married woman convey her real estate, and what are the formalities to be observed for that purpose ?

A.—In all cases where she could convey if unmarried, and where her real estate is not settled in trust with a clause restraining alienation, she can convey, by deed executed with her husband's concurrence ; and such a deed must be acknowledged by her before a judge of one of the Superior Courts at Westminster, or a master in Chancery or two Commissioners, who must, before they receive the acknowledgment, examine her apart from her husband touching her knowledge of the deed, and ascertain whether she freely and voluntarily consents thereto, 188, 189. 3 & 4 W. IV. ch. 74.

Note.—By U. C. Con. Stat. c. 85, a married woman of twenty-one years of age, may by deed executed jointly with her husband convey her real estate (s. 1) ; such deed (when executed in Upper Canada) must be executed by her in the presence of a judge of the Courts of Queen's Bench or Common Pleas, or a County Court, or of two justices of the peace of the County wherein she resides, who must examine her apart from her husband, respecting her free and voluntary consent to convey, and must certify to such consent (s. 2) : that statute also provides (ss. 3, 4,) for execution abroad.

Q. 6.—What is the meaning of the term "purchase," with reference to title to real estate ? Is a devisee under a will a purchaser, according to the legal acceptance of the word ?

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82, s. 4

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Q.
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A.—The word “purchase,” in reference to the title to real estate, has in law a meaning more extended than its ordinary sense; it is “possession to which a man cometh not by title of descent,”

78. A devisee under a will is accordingly a purchaser at law, even if he would have inherited as heir had there been no devise to him, 78, 181. See U. C. Stat. 4 W. IV. c. 1, s. 2—U. S. Stat. c. 82, s. 5.

Q. 7.—Define a lease, an under-lease, and an *Interesse Termini*.

A.—A lease is the grant of the possession of lands to a person for life, years, or at will; of which the first is a freehold estate and the others are chattel interests, 324 *et seq.* Watk. Conv. 9 ed. 312. An under-lease is a lease of a portion of the term by one who has a term of years, 335. When a lease is made, the lessee does not become complete tenant by lease to the lessor, until he has entered on the lands let; before entry, he has no estate, but only a right to have the lands for the term by force of the lease; and this right is called in law an *Interesse Termini*, 329.

Q. 8.—An assignment of a term of years is made to A. to the use of B.; does the Statute of Uses apply? Give the reasons for your answer.

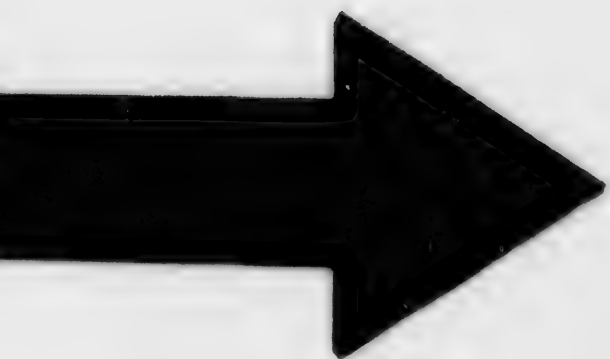
A.—No; because that statute applies only where a person “stands seized” of lands to the use of another, which a lessee does not, as a leasehold is only a personal interest, and the seisin is in the lessor, 131, 316, 324.

Q. 9.—What is the rule of law known as the rule in Shelley’s case?

A.—When the ancestors by any gift or conveyance, takes an estate for life, and in the same gift or conveyance an estate is immediately limited to his heirs in fee or in tail, the words “the heirs” are words of limitation of the estate of the ancestor; and also, when the ancestor by any gift or conveyance takes an estate of freehold, and there is afterwards, in the same gift or conveyance, a limitation to his heirs or heirs in tail, after some other estate for life or in tail interposed between his freehold and such limitation to his heirs, &c., this remainder to his heirs vests in the ancestors as a remainder, 209—213. Watk. Conv. 110 and note. Shelley’s case, 1 Rep. 94, 104.

Q. 10.—Under a limitation of lands in a deed to the following effect: “to A. for life, and after his decease to B. for his life, and





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after his decease to the heirs of A." Explain what estate A. has in the lands.

A.—In possession he has an estate for life ; in remainder, expectant on the decease of B. by the rule in Shelley's case, an estate in fee simple ; which latter estate would, (merging the life estate,) become an estate in fee simple in possession if B. died during the life of A. 213.

Q. 11.—Explain the doctrine of Lapse.

A.—Where a devisee dies during the life of the testator, the devise fails or lapses, for the will, not taking effect until the death of the testator, can communicate no benefit to persons who previously die, 174, 1 Jarm. Wills, 293.

Q. 12.—What are the leading provisions of the statute against conveyances of lands for charitable purposes ; and when was it passed ?

A.—That no estate or interest of any kind in land can be conveyed for charitable purposes (except to a few favoured institutions) unless made by deed indented sealed and delivered in the presence of two or more credible witnesses and enrolled in the Court of Chancery within six calendar months next after the execution thereof ; and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation or reservation of any kind in favour of the grantor or any person claiming under him ; and unless it be *bona fide* for full and valuable consideration paid at or before the making of the deed without fraud or collusion, it will be void upon the death of the grantor within twelve months after the execution. 9 Geo. II. ch. 36, s. 60.

Q. 13.—What is essential to the validity of a deed of bargain and sale ?

A.—It must be printed or written upon paper or parchment, and must be sealed and delivered ; it is held by some authorities that, since the passing of the Statute of Frauds, signature is essential, but it is maintained by others that that statute does not extend to deeds, but merely affects parol contracts, 126, (and see authorities cited,) Add. Contr. 4. A deed of bargain and sale requires a consideration in money, though it may be nominal, and requires enrolment, 165. Watk. Conv. 355.

Note.—In this Province enrolment is unnecessary to the validity of a deed of bargain and sale, U. C. Con. St. c. 90, s. 14.

Q. 14.—Give an example of estoppel by deed.

A.—Where a deed contains an averment on the part of one of the parties to it, he is precluded or estopped from denying the truth of such averment in any subsequent action between the parties to the instrument relating to the same matter; Smith Contr. 16; for example, where one has in an instrument under seal, asserted title to lands in himself, he cannot afterwards disprove it in an action upon such instrument.

Q. 15.—What is an easement?

A.—An easement is defined to be “a service or convenience which one neighbour hath of another, by charter or prescription, without profit,” as a way through his land. Toml. Law Dic. tit. *Easement*.

Q. 16.—What are the rules of descent as to real property in case of intestacy?

A.—1. Inheritances shall lineally descend to the issue of the last purchaser *in infinitum*, and the person last entitled shall be deemed to have been the purchaser, unless he be proved to have inherited, in which case the person from whom he inherited shall be considered to have been the purchaser, and so on, 78. 2. Male issue shall be preferred to female, 80. 3. Where two or more of the male issue are in equal degree of consanguinity to the purchaser, the eldest shall inherit; but the females shall inherit equally, 80. 4. All lineal descendants *in infinitum* of any person deceased shall represent their ancestor, or stand in the same place as he himself would have done had he been living, 82. 5. On failure of lineal descendants the inheritance shall descend to the nearest lineal ancestor of the purchaser, 83. 6. Male paternal ancestors and their descendants shall inherit before female paternal ancestors, 85. 7. A kinsman of the half-blood shall be capable of being heir, and shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman when the ancestor is a male, and next after the common ancestor when such ancestor is a female, 86. 8. In the admission of female paternal ancestors, the mother of the more remote male paternal ancestor and her heirs shall be preferred to the mother of the less remote male paternal ancestor and her heirs; and in the admission of female maternal ancestors the mother of the more remote male maternal ancestor shall be preferred to the mother of a less remote male maternal ancestor and her heirs, 87.

Q. 17.—What are the rules regulating the descent of a fee simple inheritance as they exist in Upper Canada?

A.—The present existing rules of descent in Upper Canada are as follows: (U. C. Con. St. ch. 82.)

Descents since 1st July, 1834. (4 W. IV. c. 1.)

1. Descents shall be traced from the last purchaser; and the person last entitled to the land shall be considered to have been the purchaser, unless it be proved that he has inherited, in which case the person from whom he inherited shall be considered to have been the purchaser, unless it be proved that he also had inherited; and so on.

2. If lands be devised to the heir at law, such heir at law shall take by devise and not by descent.

3. If lands be conveyed with a limitation to the person or the heirs of the person conveying, such person shall be considered to have acquired the lands as a purchaser by such conveyance, and not entitled as of his former estate.

4. If a person acquire lands by purchase, under a limitation to the heirs or the heirs of the body of any of his ancestors, or the like, the descent shall be traced from the ancestor as purchaser.

5. The descendants of a person attainted may inherit.

6. Proof of entry by the heir shall be unnecessary in proving title.

Descents between 1st July 1834, and 1st January 1852; (which apply also, in the absence of other provisions, to descents subsequent to the latter date.)

1. No brother or sister shall be considered to inherit immediately from a brother or sister, but shall trace descent through the parent.

2. A lineal ancestor shall inherit in preference to collateral relatives claiming through him.

3. The male line of ancestors shall be preferred to the female.

4. The mother of a more remote male ancestor shall be preferred to the mother of a less remote male ancestor.

5. Relatives of the half blood shall inherit next after relatives in the same degree of the whole blood and their issue, if the common ancestor be a male; and if the common ancestor be a female, next after such common ancestor.

Descents since 1st January, 1852. (14 & 15 V. c. 6.)

The real estate of persons dying after that date descends as

follows : *Firstly*—To lineal descendants, and those claiming by or under them, *per stirpes* ; *Secondly*—To the father ; *Thirdly*—To the mother ; *Fourthly*—To collateral relatives.

Subject to the following rules :

I. If the intestate leave several descendants in the direct line of lineal descent and all of equal degree of consanguinity to such intestate, the inheritance shall descend to such persons in equal parts, however remote from the intestate the common degree of consanguinity may be.

II. If any of the children of the intestate be living, and some be dead, the inheritance shall descend to the children living, and to the descendants of those who are dead, so that each child who shall be living shall inherit such share as would have descended to him if all the children of the intestate who shall have died, leaving issue, had been living ; and so that the descendants of such as are dead, shall inherit the share which their deceased parent would have received if living. And the same rule applies where descendants of the intestate are of unequal degrees of consanguinity.

III. If the intestate die without descendants, and leaving a father, the inheritance shall go to the father,—unless the inheritance came to the intestate on the part of his mother, and she be living. If the mother be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants as above. If there be no such brother or sister, or their descendants, living, the inheritance shall descend to the father.

IV. If the intestate die without descendants, leaving no father, or leaving a father not entitled under the last rule, and leaving a mother and a brother or sister, or descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brother or sister of the intestate as may be living, and the descendants of such as may be dead, as above. If the intestate leave no brother or sister or descendant of them, the inheritance shall descend to the mother.

V. If there be no father or mother capable of inheriting, the inheritance shall descend to the collateral relatives of the intestate in equal degree of consanguinity in equal parts.

VI. If all the brothers and sisters of the intestate be living, they

shall inherit equally; and if any of them be dead, the descendants of such shall inherit their parent's share.

VII. If the intestate leaves no heir under the preceding rules:

1. the inheritance, if it has come to the intestate on the part of his father, shall descend to the brothers and sisters of the father, and the descendants of such as may be dead in the like manner; and if there be none so to inherit, it shall similarly descend to the brothers and sisters of the mother, and the descendants of such as may be dead. 2. If the inheritance has come to the intestate on the part of the mother, it shall similarly descend to her brothers and sisters and the descendants of such as may be dead; and if there be none such, to the brothers and sisters of the father, and the descendants of such as may be dead. 3. If the inheritance came to the intestate on the part of neither father nor mother, it shall descend to the brothers and sisters of both father and mother, and their descendants, in the same manner.

VIII. Relatives of the half blood shall inherit equally with those of the whole blood in the same degree; but if the inheritance came to the intestate by descent, devise or gift of one of his ancestors, all those who are not of the blood of such ancestor shall be excluded.

IX. On failure of heirs under the preceding rules, the inheritance shall descend to the remaining next of kin of the intestate, according to the rules in the English Statute of distribution of the personal estate.

X. Co-heirs shall take as tenants in common in proportion to their respective rights.

XI. Descendants and relatives of the intestate begotten before, and born after his death, shall inherit as if born before his death.

XII. Illegitimate children shall not inherit.

XIII. If any child of an intestate shall have advanced by settlement or portion, and the same shall have been so expressed in writing by the intestate, or acknowledged by the child, the value of such advancement or portion shall be reckoned as part of the intestate's real and personal estate; if the advancement or portion be equal or superior to the amount of the share which such child would take, such child shall be excluded from any further inheritance; if unequal, such child shall be entitled to so much as will

make his share equal to that which he otherwise would have inherited.

Q. 18.—A. is tenant for life with remainder to B. in tail; how can B. at the present day, acquire an estate in fee simple in remainder? Explain the mode of proceeding for a similar purpose previously to [U. C. Stat.] 9 Vic. c. 11.

A.—He may acquire an estate in fee simple in remainder by conveying such an estate to a third person to the use of himself and his heirs, with the consent of A. given by the same deed, or by a separate deed executed on or before the day of execution of the conveyance, 47, 155. Such conveyance, and the deed by which A. consents, if a separate one, must be enrolled in the Court of Chancery; (in this Province, instead of enrolment, registry in the proper county Registry office within six months, is made requisite by 9 V. c. 11, ss. 29, 34—U. C. Con. St. c. 83, ss. 31, 36.) and such latter deed must be enrolled (or registered) at or before the enrolment (or registry) of the conveyance.

Q. 19.—An estate is conveyed to A. and his heirs to such uses as B. shall appoint:—in whom does the common law seisin reside until appointment? and if B. appoints to C. to the use of D., who takes the legal estate? ✓

A.—The common law seisin will, until appointment, reside in the grantor, as the use is in him, 132. Upon appointment C. takes the legal estate, and he has the use, which is all that B. can dispose of, and the use to D., is a use upon a use, which gives merely an equitable estate, 246, 134.

Q. 20.—By 1 W. 4. c. 1, (Prov. Stat.—U. C. Con. c. 82, s. 11.) a will may operate so as to pass real estate acquired after the execution of the will. What was the old rule on this subject, and upon what principles was it founded?

A.—The old rule was that a general devise of lands was in effect a specific disposition of such lands, and such only, as the testator had at the time of making the devise; because a will was regarded as a present conveyance, to come into operation at a future time, that is, on the death of the testator, and consequently he could devise such lands only as it was then in his power to convey, 172, 173; 1 Jarm. Wills. 287.

Q. 21.—How can a term of years be made to cease?

A.—By surrender, 837, 341; by re-entry on breach of a condi-

tion contained in the lease, 201, Watk. Conv. 38; by merger where the lessee acquires another term in the lands leased, or where the term and a freehold estate meet in the same person, 341. Watk. Conv. 56.

Q. 22.—To whom, on the death of the tenant intestate, does the unexpired term of years pass?

A.—To the administrator of the tenant, as it is personal property, 334.

Q. 23.—What are the various kinds of estates in real property?

A.—1. Freehold estates: an *estate for life*, being either for the life of the tenant himself, or for that of another—*pur autre vie*, 16, 22; an *estate tail*, or an estate given to a man and the heirs of his body, being general, to the heirs of his own body generally, and special, to certain particular heirs of his body, as those by a particular wife, 30; and an *estate in fee simple*, being an estate given to a man and his heirs, 54. 2. Estates less than freehold: *tenancy at sufferance*, where one who has originally come into possession by a lawful title, holds such possession after his title has determined, 325; *tenancy at will*, where land is held of another by an estate determinable at the will of either the lessor or lessee, 325; Watk. Conv. 1; and an estate for a *term of years*, where one holds lands of another at a rent reserved, for a term certain or from year to year.

Q. 24.—What estates may pass by word of mouth? what, if any, by writing not under seal? what estates, if any, must be created by deed, and whether by deed poll or indenture? and state whether a freehold estate can be granted in any way, and what, other than by deed.

A.—A tenancy at will may be created by word of mouth, 324; as also a tenancy for a term not exceeding three years, and reserving at least two-thirds of the full improved value of the land as rent, 326. All other estates, whether freehold or leasehold, must be created by deed, which may be either deed poll or indenture, 125, 126, 326. 29 Car. 2, c. 3, ss. 1, 2; 8 & 9 V. c. 106. [U. C. Con. St. c. 90.]

Q. 25.—What is meant by dower? In what cases is a woman entitled thereto?

A.—Dower is a life interest which a wife surviving her husband has in one-third part of the lands of which he, during the cover-

ture, was at any time seised, solely, in fee simple or fee tail, and to which any issue she may have had, might by possibility have been heir, 190, 191.

Q. 26.—Can dower be sold or assigned before it is set apart ; and can the assignee enforce, and how, the claim so assigned ?

A.—Before entry, the widow has only a right which must be conveyed (*i. e.* extinguished) by release, and that to the person having the freehold in possession of the lands, for to him only can a release of her right be made. After entry, she is seised of an estate of freehold, which she may convey to the person immediately in reversion, by a deed of surrender, or to a stranger by any mode of conveyance by which a freehold may be transferred. Watk. conv. 87.

Q. 27.—When was the Statute *De Donis* passed, and what was its object ?

A.—18 Edw. 1, c. 1. Its object was to keep up the feudal system, by preventing the free alienation of lands, 38.

Q. 28.—Define a reversion, and mention some of its incidents.

A.—When a person has an estate in lands, and grants any less or particular estate (as it is called), the interest which still remains undisposed of is called the reversion, as upon the determination of the particular estate, the possession of the lands will revert to him, 197. Watk. Conv. 217. To a reversion the usual incidents are fealty and rent or rent-service, of which the former is now never exacted, 199, 204.

Q. 29.—Define a remainder.

A.—Where a person, at the time of granting a particular estate, conveys also his reversion, or a part of it, the interest so conveyed is called a remainder, 198.

Q. 30.—What is the difference between a reversion and a remainder ?

A.—By a reversion, upon the determination of the particular estate, the estate reverts to the donor ; by a remainder, it goes to a third person (*ante* :) between the owner of particular estate and the owner of the reversion, a tenure exists, 199 ; but there is none existing between the owner of the particular estate and the remainder-man, 205 ; also, a reversion is created by operation of law upon the granting of the particular estate ; whereas a remainder is created by express grant ; 198, 206.

Q. 31.—What is the difference between a vested and a contingent remainder?

A.—A vested remainder is one which is always from its commencement ready to come into possession immediately upon the determination of the estate which precedes it; a contingent remainder is one which is not so ready to come into possession until the occurrence of some contingent event; but upon the occurrence of which it will become vested, 222.

Q. 32.—What is the difference between an executory devise and a contingent remainder?

A.—1st, A contingent remainder may be created by any mode of conveyance,—the latter only by will, 218. 2nd, An executory devise respects personal estate as well as real. 3rd, A contingent remainder is a future estate which waits for and depends on the determination of the estate which precedes it, 222; an executory devise arises when its time comes as of its own strength, and depends not for protection on any prior estate, but on the contrary, often puts an end to any prior estate which may be subsisting, 241. Formerly, also, there was this difference, that a contingent remainder was continually liable to be destroyed until it became vested, while an executory devise is indestructible, 241; but this distinction is now done away with by 8 & 9 V., c. 106, s. 8. [See U. C. Con. St. c. 90, s. 6.]

Q. 33.—What are springing uses and shifting uses respectively? Give an example of each class, and shew in what way they do not conform to common law.

A.—A springing use is a use by means of which an estate is caused to spring into existence at a future time; a shifting use is a use by means of which an estate limited to one person is made, upon a certain event taking place, to shift away from him to another. Thus a feoffment may be made to A. and his heirs to the use of B. and his heirs from to-morrow; at common law, B.'s estate would have been void, but by means of the springing use, becomes good. A feoffment may be made to the use of A. and his heirs until to-morrow, and then to the use of B. and his heirs: B.'s estate in such case also is void at common law, but by means of the use, the estate shifts from A. to him. 242, *passim*.

Q. 34.—Distinguish between a shifting use and a remainder.

A.—A shifting use upon coming into force, destroys the estate

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upon which it depends, while a remainder must wait for the determination of such estate. A shifting use also differs from a remainder in that it may be preceded by an estate in fee simple, which a remainder cannot. 243, 244.

Q. 35.—A. tenant for life, with remainder to B. in tail with remainder over to C. in fee: can B. bar his issue without barring the remainder?

A.—He may bar his issue, without barring the remainder, by a deed enrolled in the Court of Chancery (or, in this Province, registered in the proper county Registry office), within six months after execution, 44.

Q. 36.—When was the Statute of Wards and Liveries passed? and what important effect had it on the tenure of land?

A.—12 Car. II. c. 24—1660. It abolished all tenures of estates of inheritance in the hands of private persons, except copyhold tenures, and changed them into free and common socage, 100.

Q. 37.—Is a woman entitled in any, and what, cases to dower out of her husband's equitable estates?

A.—Stat. 3 & 4 W. IV. c. 105, gives a wife a right to dower in her husband's equitable as well as legal estates of inheritance in possession, excepting estates in joint tenancy, 194, and see more fully, answer to Q. 25.

Note.—U. C. Stat. 4 W. IV. c. 1, s. 14—U. C. Con. St. c. 84, s. 2, contains a similar enactment.

Q. 38.—Upon the death intestate of a tenant *pur autre vie*, living *cestui que vie*, and there being no special occupant named in the deed creating the estate, who is entitled to the estate? Is the law on this subject determined by any, and what, statutes?

A.—The Statute of Frauds, 29 Car. II. c. 3, s. 12, provides that in such case the estate should go to the executors and administrators of the tenant so dying intestate, and be subject to payment of his debts, during the residue of the life of the *cestui que vie*, 20; and by Stat. 14 Geo. II. c. 20, s. 9, the surplus of the proceeds of the estate, after payment of the debts, is distributable among the next of kin, in the same manner as personal estate, 21. Both these enactments have been repealed by enactments to the same effect, by 7 W. IV., and 1 V. c. 26, ss. 3, 6.

Q. 39.—In what case does a use result to a feoffee?

A.—Where one makes a feoffment to another and his heirs with-

out any consideration : before the Statute of Uses was passed, the feoffor would in such case be held in equity to have the use, for want of consideration to pass it to the feoffee ; now, therefore, by force of the statute, the feoffor having the use, has also the legal seisin. (But if the feoffment be made *unto and to the use of* the feoffee and his heirs, the feoffee will have the use.) 132.

Q. 40.—Can a man in any, and what manner, convey to himself ?

A.—At common law a man could not convey to himself, but by means of the Statute of Uses he can do so, by conveying to another to the use of himself, 155.

Q. 41.—Can real property be settled to the separate use of a married woman be rendered for any, and what length of time inalienable by her ?

A.—It can be rendered inalienable by her during her coverture, 183.

Q. 42.—By what statute are estates tail as they now exist originally established ?

A.—By the Statute 13 Edw. I. c. 1, called the statute *De Donis Conditionalibus*, 38.

Q. 43.—State the rule of law against perpetuities:

A.—An estate cannot be given to an unborn person for life, followed by any estate to any child of such unborn person,—in such case, the estate given to the child of the unborn person is void, 228. An executory estate must be limited to commence within the period of any fixed number of now existing lives, and an additional term of twenty-one years ; allowing further for the period of gestation should gestation actually exist, 262.

Q. 44.—What are the requisites of a legal jointure sufficient to bar a widow of dower ?

A.—It must be a competent livelihood of freehold lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least, 192. 2 BL. Com. 137.

Q. 45.—In whom does the property in timber unlawfully cut down by a tenant for life vest upon its severance.

A.—In the first person who has a vested estate of inheritance. 3 Cox's P. Wms. 267 ; 3 Woodd. 400.

Q. 46.—What covenants for title should an ordinary vendor give?

A.—1, That he is seised in fee simple: (but this is now usually omitted, as the second is sufficient without it.) 2, That he has good right to convey the lands. 3, That they shall be quietly enjoyed. 4, That they are free from encumbrances. 5, For further assurance. An ordinary vendor never gives absolute covenants, but limits his responsibility to the acts of those who have been in possession since the last sale of the estate. 369.

Q. 47.—What covenants for title should a mortgagor give?

A.—Absolute covenants, 369.

Q. 48.—What covenants for title is a purchaser entitled to from a trustee for sale?

A.—A covenant only that he (the trustee) himself has done no act to encumber the premises. 369.

Q. 49.—When a power is required to be executed by writing under hand and seal attested by two witnesses, what should be the form of the attestation?

A.—It should be "*signed, sealed and delivered, &c.,*" for the power being required to be exercised by a writing *under hand and seal attested by witnesses*, the exercise of the power is invalid if the witnesses do not sign an attestation of the signature, as well as of the sealing, 247.

Q. 50.—Under a devise to husband and wife and their heirs, what will the wife surviving her husband take?

A.—She takes the fee simple: they are tenants by *entireties*, each being seised of the whole estate and neither of part, therefore upon the death of one of them the survivor has the whole, and that by original limitation, and not by survivorship, 185. Watk. Conv. 177.

Q. 51.—What is an estate by the courtesy of England?

A.—A life estate which the husband, upon surviving his wife, has in lands and tenements of which she was seised in fee simple or fee tail, 185, and see following question and answer.

Q. 52.—What is essential to constitute a title to an estate by the courtesy of England?

A.—It is essential that the marriage be lawful; that the husband have had issue by the wife which might possibly have inherited the estate as her heir; that the estate be a several one, o

else held under a tenancy in common, but not one of which the wife was seised jointly with another; and that the estate be one in possession; 185, 186. 2 Bl. Com. 127.

Q. 53.—Are the conveyances of infants void or voidable only?

A.—The conveyance of infants are in general voidable only, and may be confirmed by them upon attaining full age, 59. But it seems to be the general opinion that a conveyance by an infant which is manifestly to his disadvantage is void, Watk. Conv. 420. Add. Contr. 89. An infant may in some cases make a valid feoffment, 122.

Q. 54.—Can a tenant *pur autre vie* devise his estate? Does his right in this respect depend on common law or statute?

A.—The Statute of Frauds, 29 Car. II., c. 3, s. 12, provided that a tenant *pur autre vie* might dispose thereof by his will, 20. This enactment is superseded by an enactment to the same effect, 7 W. IV. & 1 V., c. 26, 21.

Q. 55.—Is a contract or agreement by a tenant in tail with a purchaser, to convey to him the fee simple, sufficient in equity to bar the entail?

A.—It is not; an estate in equity may be barred in the same manner as an estate tail at law, and cannot be disposed of by any other means, 136.

Q. 56.—Can a settlement of lands made by a man after marriage, upon his wife and children, be defeated by him? Does this depend upon any and what statute? Is there any and what difference in the law in this respect between real and personal property?

A.—A voluntary settlement of real property may, by Stat. 27, Eliz., c. 4, be defeated by the settlor by a subsequent conveyance to a purchaser for money or other valuable consideration, even if such subsequent purchaser have notice of the prior settlement, 62. Add. Contr. 685. A voluntary settlement of personal property cannot be afterwards defeated by him, Will. Pers. Pro. 3 ed., 237. But settlements of real and personal property are both void if he be in debt, 13 Eliz., c. 5, 62.

Q. 57.—What is the proper mode and form of conveyance to be adopted by a man who wishes to convey an estate in fee to another, reserving a life estate to himself?

A.—He should make a conveyance of the estate to the intended

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grantee and his heirs to the use of himself (the grantor) for his life, and from and immediately after his decease, to the use of the grantee, his heirs and assigns. He will thus be seised of an estate for his life, and after his decease an estate in fee simple will remain for the other. 155.

Q. 58.—How must a rent-charge be created ?

A.—Being an incorporeal hereditament, it can only be created by deed, or by will, 270, 271.

Q. 59.—What is the effect of a release of part of the lands subject to a rent-charge ? Give your reasons.

A.—It releases the whole, because a rent-charge is regarded as a thing entire and indivisible, 276.

Q. 60.—What right of disposition has a husband over a term of years belonging to his wife ?

A.—He may dispose of it any time during the coverture, either absolutely or by way of mortgage, 336.—[But see U. C. Con. St. c. 73, s. 1, by which a married woman is empowered to hold her property free from the control of her husband.]

Q. 61.—Where is the legal estate in the following limitations :
1, Bargain and sale to A. B. and his heirs to the use of C. D. and his heirs ; 2, Lease and release to A. and his heirs to the use of B. and his heirs ; 3, A Statutory deed of grant to A. and his heirs to the use of B. and his heirs ?

A.—1, In A. B. and his heirs, for a use cannot be limited in a bargain and sale to any but the bargainee, 105. Watk. Conv. 249.
2, In B. and his heirs, and 3, in B. and his heirs, by virtue of the Statute of Uses, 27 Hen. VIII., c. 10, which enacts that where any person or persons shall stand seised of any lands or other hereditaments to the use, confidence or trust of any other person or persons, the person or persons having any such use, confidence or trust, shall be deemed in lawful seisin or possession of the same lands and hereditaments for such estates as they have in the use, confidence or trust, 131.

Q. 62.—Was a limitation in a deed of an estate to take effect after the determination of a precedent estate in fee, good at common law ?

A.—At common law it was not, for the estate in fee carried with it so great a power of alienation that the remainder might be kept forever out of possession, 208, 243.

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Q. 63.—Is there any and what mode of assurance by deed, by which an estate may be limited to take effect after the determination of a precedent estate in fee?

A.—Such a limitation may be effected by means of a shifting use, by which the estate in fee is destroyed, and the estate so limited is substituted, 244.

Q. 64.—Give an instance in which the person entitled to a first charge upon an estate by way of mortgage, would formerly have lost the benefit of that charge by the effect of merger? What alteration as to this has been made by statute in Upper Canada?

A.—Where a prior mortgagee purchased the equity of redemption, his mortgage merged, so that a subsequent mortgage became a first charge upon the estate; Coote Mortg. 3 ed., 510. By U. C. Stat. 14 & 15 Vic., c. 45, s. 1—U. C. Con. Stat. c. 87, s. 1, a mortgagee may acquire the equity of redemption without merger of the mortgage debt, as against any subsequent mortgagee.

Q. 65.—If a tenant in tail in possession enter into a written agreement for the sale of his estate, can the purchaser enforce specific performance of the contract in equity? Would specific performance be decreed against the heir in tail? Give your reasons.

A.—Specific performance would be decreed against the tenant in tail, because he has power to convey his estate, (see answer to Q. 100,) 43; but not against the heir in tail, because a contract for the sale of lands by the tenant in tail, which is not completed in his lifetime by the proper bar, will be null and void as against the heir in tail, 50. [By U. C. Stat. 9 Vic., c. 11, s. 35—U. C. Con. Stat., c. 83, s. 37, the Court of Chancery is precluded from decreeing specific performance of a contract by a tenant in tail to dispose of the estate.]

Q. 66.—Is there any and what statutory enactment in Upper Canada as to the destructibility of contingent remainders?

A.—14 & 15 Vic., c. 7, s. 7.—U. C. Con. Stat. c. 90, s. 6, enacts that a contingent remainder shall be capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger, of any preceding estate of freehold.

Q. 67.—Give an instance of tenancy by sufferance.

A.—Tenancy by sufferance is where one who has come into possession originally by a lawful title, retains possession after his title

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is determined, as where a tenant for a term of years holds over after the term has expired, 325. Watk. Conv. 24.

Q. 68.—What powers may, and what may not, be released or extinguished by the donee?

A.—Any power may be released or extinguished by him, unless his duty may require him to exercise it at some future time, 256.

Q. 69.—What is a use? and, in connexion with this, explain the operation of a conveyance under the Statute of Uses.

A.—A use is "the profit or benefit of lands and tenements, or a trust and confidence reposed in a man for the holding of lands, that he to whose use the trust is made shall take the profits thereof," Toml. L. Dic. tit. *Uses*. Before the passing of the Statute of Uses, a person to whom a gift of lands was made and seisin delivered, was considered at law to be thenceforth the true owner of the lands; but in equity it was held that mere delivery of the seisin by one person to another was not conclusive of the right of the feoffee to enjoy the lands of which he was enfeoffed, but compelled him to hold his legal title for the benefit of any other person who might have a more righteous claim to the beneficial enjoyment; thus where a feoffment of lands was made to one person to the use of another, equity obliged him to hold for the use of that other. Transactions of this kind became so frequent that it was at length found necessary to make an enactment, (Statute of Uses, 27 Hen. VIII., c. 10,) that where any person or persons stood seized of lands or other hereditaments to the use, confidence or trust of any other person or persons, the person or persons having such use, confidence, or trust, should be deemed in lawful seisin and possession of the same lands and hereditaments, for such estates as he or they might have in the use, confidence, or trust. Therefore if a conveyance (other than bargain and sale, in which a use can be limited to none but the bargainee,) be made to A. and his heirs to the use of B. and his heirs, A., who would formerly have had the legal estate, now takes no estate at all, but is made by the statute merely a "kind of conduit pipe" for conveying the estate to B., who, *having the use*, is deemed to be in lawful seisin and possession of an estate in fee simple. 129-132.

Q. 70.—Explain the nature of a mortgage, and the respective rights of the mortgagor and mortgagee.

A.—A mortgage is, at law, an absolute conveyance, subject to an

agreement for re-conveyance upon a given event, namely, upon payment of a sum of money at a certain time; in equity it is looked upon as a debt, the payment of which is secured upon certain lands. By such conveyance the mortgagee has the legal estate, subject to an agreement under which the mortgagor has a right of enjoyment until the day named for payment, and subject to such right of redemption: upon failure of payment upon the day named, the mortgagee may eject the mortgagor, and acquire the absolute legal estate in the lands, but equity allows the mortgagor to redeem his estate upon payment of principal, interest and costs due upon the mortgage, within a reasonable time after the day for payment has passed, and will compel the mortgagee to hold the estate as a trustee for the mortgagor, and account for the rents and profits to him, and to reconvey when he has received so much as will suffice to repay him the principal interest and costs. 349 et seq.

Q. 71.—How may an easement be conferred or lost?

A.—By express deed of grant, or by prescription from long enjoyment (which supposes a grant.) It may be lost by being released or surrendered, or by non-use for twenty years, upon which a release or surrender will be presumed, 269. See Toml. L. Dicts. *Easement, Ways*.

Q. 72.—What are the principal interests of a personal nature arising out of real estate?

A.—A term of years, and a mortgage debt, 322.

Q. 73.—What is meant by "covenants running with the land?" and give an example.

A.—Covenants by a lessee, which are binding upon every one to whom a term of years is assigned, and those by a lessor of which the benefit passes to the assignee: as, a covenant by a lessee for himself and his assigns, to build a wall upon the demised premises; a covenant to renew, 331. Watk. Conv. 316 et seq., 325. See Spencer's case, 5 Co. 16. See answer to Q. 125. The following are examples of covenants which have been held to run with the land: covenant for quiet enjoyment, *Lewis v. Campbell*, 8 Taunt. 715; to pay rent, *Parker v. Webb*, 3 Salk. 4, *Vyvyan v. Arthur*, 1 B. & C. 410; to repair, *Buckley v. Pirk*, 1 Salk. 317; to insure, *Vernon v. Smith*. 5 B. & Ald. 1; to supply the demised premises with water, *Jourdain v. Wilson*, 4 B. & Ald. 266; to reside on the

premises, *Tatem v. Chaplin*, 2 H. Bl. 133; to renew, per Lord Ellenborough, *Roe v. Haley*, 12 East, 469.

Q. 74.—Are words of limitation necessary, in order to create an estate in fee simple?

A.—By Stat. 7 W. IV. & 1 V., c. 26, real estate may be devised in fee simple without words of limitation, the devise being construed to pass the whole estate or interest which the testator has power to dispose of, 177. [See U. C. Stat. 4 W. IV., c. 1, sec. 50—U. C. Con. Stat. ch. 82, s. 12, which contains a similar enactment.] Formerly, also, a fee simple might pass without words of limitation, by a conveyance by bargain and sale, for it was presumed that the purchase money was paid for an estate in fee simple, but this has been overruled, 150. *Watk. Conv.* 143, 144.

Q. 75.—What are the rights of aliens with respect to the ownership of real property.

A.—An alien friend may hold real property for the residence of himself or his servants, or for the purpose of any business, trade, or manufacture, under a lease for a term not exceeding twenty-one years, (7 & 8 V., c. 66, s. 5.) An alien cannot hold any greater estate, for a conveyance to him is a cause of forfeiture to the Crown, and the lands may be seized by the Crown upon office found; though if he convey to a natural born subject the conveyance will be valid for all purposes, except to defeat the prior right of the Crown, 58. [In this Province an alien may hold real estate, 12 V., c. 197, s. 12,—*Can. Con. St.*, c. 8, s. 9.]

Q. 76.—What is meant by an "equitable estate in fee simple?"

A.—An estate in fee simple to which the owner is entitled only in the contemplation of a Court of Equity, 135.

Q. 77.—Can a husband convey to his wife? and give reasons for your answer.

A.—At common law he could not; for as he could not convey to himself, neither could he convey to his wife, who is part of himself; but he may do so by means of the Statute of Uses, by a conveyance to another to the use of his wife, for the operation of that statute will pass the legal seisin to her, 185.

Q. 78.—Can a mortgagor make a conveyance by lease and release? and give reasons for your answer.

A.—He cannot; for the mortgagee has the legal seisin, and

therefore the mortgagor cannot convey by bargain and sale, and consequently cannot convey by lease and release, of which mode of conveyance the foundation is laid upon a bargain and sale, 349, 151, Watk. Conv. 234.

Q. 79.—Give the most important provisions of the Statute of Limitations, with respect to real estate.

A.—Its provisions are, that no person can bring an action for the recovery of real estate but within twenty years after the time at which the right to bring such action shall have first accrued to him, or to some person through whom he claims: and as to estates in reversion or remainder, or other future estates, the right shall be deemed to have first accrued at the time when the estate became an estate in possession: a written acknowledgment of title by the person in possession will extend this right to twenty years from such acknowledgement; if the person entitled be, at the time when the right accrues, under any disability by reason of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, ten years are allowed from the time of the removal of such disability, so as the whole period may not exceed forty years. And where a mortgagee has obtained possession of lands, the mortgagor must bring his suit to redeem within twenty years after the obtaining of such possession, or after a written acknowledgement of his right has been given by the mortgagee. Also, it provides that money charged upon land and legacies, are to be deemed satisfied at the end of twenty years, if no interest be paid or written acknowledgement given in the meantime, 373. [See U. C. Con. St. c. 88.]

Q. 80.—What is the effect of the destruction of the reversion upon the rent incident to it?

A.—At common law the rent was destroyed: Stat. 8 & 9 V., c. 106, however, provides that when the reversion expectant on a lease shall be surrendered or merge, the estate, which for the time being confers, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease, 204, 205. [U. C. Con. St. c. 90, s. 7, contains a similar enactment.]

Q. 81.—What is equitable jointure ?

A.—Any terms, other than legal jointure, accepted by the wife before marriage in consideration of the extinguishment of her title to dower, 193, (and see answer to Q. 44.)

Q. 82.—What are powers, and explain how estates thereunder take effect ?

A.—“ A power is an authority expressly reserved to the grantor, or expressly given to another, to be exercised over lands, &c., granted or conveyed at the time of the creation of such power,” Watk. Conv. 268. Estates thereunder take effect by virtue of the Statute of Uses, for the authority is so given that, upon the exercise of it, a use with its accompanying estate springs up, giving the seisin to the appointee, 245, 255.

Q. 83.—Explain the feudal system, and state the effect of its introduction into England ?

A.—The feudal system was a system of military tenures, adopted for the protection of the king, or lord paramount, by his vassals or barons in the first place, and for the protection of the vassals themselves by their vassals, who held the same position towards their immediate lords as those lords did to the lord paramount. The king, to bind his vassals in his interest, granted lands to them to hold by such military tenures, reserving certain services or rents, of which an oath of fealty to him was the principal; these vassals or tenants *in capite*, as they were called, parceled out the lands so granted to them to inferior vassals in a similar manner, who again allotted their portions to others; and thus a system was established by which the people were bound in the service of their rulers. Incident to this system were an immense variety of tenures, both of a military nature and otherwise, and a great number of various rights and duties between the lord and his vassals. The effects upon real property of its introduction into England were so great, that even at the present day a conveyance of lands cannot be explained without some knowledge of feudal principles; but the most important result was the restraint which was placed upon the alienation of lands, which, though removed to a very considerable extent by various enactments, is still traceable in our modern text-books. [For a more complete answer to this question—which manifestly cannot be expected in a work like

the present—we would refer the student to the introductory chapter of Mr. Williams' Treatise, and to 2 Blackstone's Commentaries, chap. IV.]

Q. 84.—What are the rights of married women with respect to real estate?

A.—During coverture a married woman is looked upon by the law as one person with her husband—she is, as it were, merged in him: he therefore is entitled to the whole of the rents and profits which may arise from her lands; but, though he acquires a freehold interest therein, he cannot alien them without her concurrence and after his death they remain to the wife as before the coverture. But she may hold equitable estates, through the intervention of trustees, free from the control of her husband in any way. In consequence of the husband and wife being considered as one person, if a conveyance be made, for example, to A. and B. (husband and wife), and C., a third person, and their heirs, A. and B. being one, will take only a moiety of the rents and profits, and will have a power of disposition over one half only of the estate, being together one joint tenant with C., and if lands be conveyed to husband and wife and their heirs, they will not be joint tenants, but take by *entireties*, each being seised of the whole estate, which remained in the survivor upon the death of one of them. A wife has no interest in the lands of her husband during coverture, but after his death, she has a life interest, called her *Dower*, in one third part of the lands of which he was lawfully seised in fee simple or fee tail in possession, during the coverture. 182 et seq. [But in Upper Canada, by 22 V. c. 34, s. 1,—U. C. Con. St., c. 78, s. 1, a woman who marries without any marriage contract or settlement, may, notwithstanding her coverture, "have, hold and enjoy" all her real and personal property, whether belonging to her before marriage, or subsequently acquired, (except property received from her husband during coverture,) free from his control.]

Q. 85.—What are the limitations upon a mortgagor's right to redeem? and how is this affected by statute.

A.—The mortgagor has a right to redeem "within a reasonable time," 353. By 3 & 4 Wm. IV. c. 27, s. 28, such right to redeem is limited to twenty years from the time when the mortgagee obtains possession of the land, or from any written acknowledgment of the mortgagor's title, or of his right of redemption, given to him

or his agent, signed by the mortgagee, 374. [See U. C. Con. St., c. 88, s. 21.]

Q. 86.—Distinguish between the different kinds of conveyances and their effect.

A.—The most ancient mode of conveyance was a *feoffment*, or a gift of an estate in the lands with *livery* (delivery) of the *seisin* or feudal possession. Such a conveyance, until a recent enactment, (8 & 9 V. c. 96, s. 4—see U. C. Con. St. c. 90, s. 3,) would have operated by wrong, that is, would have conveyed to the feoffee the whole estate limited to him by the feoffor, even if greater than he had power to dispose of otherwise. A feoffment formerly might be made by parol, but now by the statute of frauds, 29 Car. II, c. 3, s. 1, and 8 & 9 V. c. 106, s. 3, [U. C. Con. St., c. 90, s. 3,] it must be made by deed. 116—122, 126.

A conveyance by *Lease and Release* was formerly effected by means of two deeds, a *Lease*, having the effect of a bargain and sale, by which the grantee obtained possession of the lands, and a *Release*, by which his estate was enlarged to an estate of freehold, the legal seisin being thereby conveyed to him; now by 4 & 5 V. c. 21, a *Release* has the same effect as a *Lease and Release* before that act; 146—153. Watk. Conv. 299. A lease and release was said to be an innocent conveyance, that is it never operated by wrong, but only passed the same estate which the grantor had in the lands, 164.

A *Bargain and Sale* is a conveyance which derives its effect from the Statute of Uses, 27 H. VIII, c. 10; for before the passing of that act, the Court of Chancery had held that where a bargain was made for the sale of an estate, and the purchase money paid, but no feoffment executed to the purchaser, the estate ought in conscience to belong to the purchaser, and therefore held that the bargainor was seized of the lands to the use of the purchaser, which doctrine, upon the passing of the act had the effect of giving the legal seisin to the purchaser, (see answer to Q. 69). It was held that a bargain and sale passed an estate in fee simple, without the usual limitation to heirs, for the purchaser was presumed to have paid the purchase money for such an estate, (150), but this has been doubted, and the better opinion would seem to be that it has not that effect; see Watk. Conv. 14^o 144. A use cannot be limited by a bargain and sale, for the bargainee himself has the use,

and there cannot be a use upon a use, Watk. Conv. 249. This also is an innocent assurance, Watk. Conv. 357.

By 8 & 9 V. c. 106, s. 2, [U. C. Con. Stat. c. 90, s. 2.] a *Deed of Grant* is sufficient to convey the freehold or feudal seisin of all lands: formerly such a conveyance was only applicable to the transfer of incorporeal hereditaments, which were therefore said to lie in grant, as corporeal hereditaments were said to lie in livery; but now by that enactment, the latter lie in grant as well as in livery. A grant also is an innocent conveyance. 147, 164, 195.

A *covenant to stand seised* is a conveyance which is occasionally used, whereby the grantor covenants to stand seised to the use of the grantee, in consideration of blood or marriage. This mode of conveyance also derives its effect from the Statute of Uses. 166; Watk. Conv. 299.

A conveyance of lands may also be effected by means of an *appointment* under a *power*, by which an estate may be made to arise by means of a springing use, 166, 245; see answers to Qs. 33, 82.

Q. 87.—What are the various kinds of tenures?

A.—All lay tenures are reducible to four kinds; 1. Tenure by knight's service, which was esteemed the most honourable; 2. Socage tenure, also consisting of free and honourable and certain services; 3. Copyhold tenures, or tenures by copy of the Court roll at the will of the lord; and 4. Tenure in ancient demesne, or villein-socage; the first of these has been, by Stat. 12 Car. II, c. 24, converted into free and common socage, and by the same act, it is provided that the crown cannot create any tenure other than free and common socage. Besides these there is an ecclesiastical tenure, called tenure in frankalmoign or free alms. 94, 108. 2 Bl. Com. chaps. V., VI.

Q. 88.—In the deduction of a title why are sixty years required?

A.—That length of time has become customary, but its origin is uncertain: it probably arose from the ordinary duration of human life; for a remainder after an estate tail may be barred, but a remainder after a life estate cannot, so that an estate of which the title appears to have been clear for that length of time may be presumed to have been well founded, 371. Another reason may be given,—an estate cannot be bound up for more than three lives, or twenty-one years, (228, 262,) after the expiration of which time, if the

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person entitled be under a disability to assert his claim, his right may remain unasserted for forty years and no longer without being barred, (374,) so that a title of sixty years duration may in the natural course of things, be presumed to be perfect.

Q. 89.—Give the effect of the Provincial Statute as to barring estates tail.

A.—It enables every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, by a deed, registered in the Registry office of the county, city or riding in which the land lies, within six months after execution, to dispose of the lands entailed for a fee simple or any less estate, as against the heirs in tail and the remainder-man, U. C. Con. St. c. 83, ss. 4, 31. By s. 8 power is given to enlarge base fees. By s. 11 it is enacted that the owner of the first existing estate under settlement, prior to the estate tail under the same settlement, shall be the protector of the settlement, (and see following secs.,) and, by s. 24, his consent is necessary to enable the tenant in tail to create a larger estate than a base fee, (see following secs.) which consent must, by ss. 32, 36, be given by the same assurance by which the entail is disposed of, or by a separate deed, executed before such assurance or at the same time, and registered before or at the time of registry of such assurance. By s. 37, Courts of Equity are excluded from giving effect to defective dispositions, or from decreeing specific performance of contracts for the dispositions of estates tail under the act.

Q. 90.—Distinguish between a stipulation to diminish, and a stipulation to raise interest, respectively.

A.—The latter is held to be void, as being a hardship upon the debtor,—the former is considered to be for his benefit and therefore is valid, 359.

Q. 91.—How do voluntary conveyances stand with respect to purchasers and creditors respectively?

A.—[See answer to following question.]

Q. 92.—Explain the effect of the statutes passed in the 13th and 27th Elizabeth upon alienations of property.

A.—By the former statute, 13 Eliz. c. 5, conveyances of landed estates, and also of goods, made for the purpose of delaying, hindering, or defrauding creditors, are void against them, unless made upon good (i. e. *valuable*) considerations, and *bona fide*, to any person not having, at the time of the conveyance, notice of such

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fraud. By 27 Eliz. c. 4, voluntary conveyances of any estate in lands, tenements, or other hereditaments, and conveyances of such estates made with any clause of revocation at the will of the grantor, are also void as against subsequent purchasers for money or other valuable consideration; so that one who has made a voluntary settlement of landed property, even on his own children, may afterwards sell the same property to any purchaser; who may hold against the prior grantees, even though he have full notice; 62.

Q. 93.—How may the estate of a tenant for life be forfeited?

A.—By outlawry or attainder for treason or felony, unless the estate be given for the "natural life" of the tenant; by marriage, if the tenant for life be a widow, the estate having been given to her during her widowhood, (such being in law a life estate,) or in similar cases; 22, 23. Watk. Conv. 80. Also, before 7 & 8 V. c. 76, the estate might have been forfeited by any act which divested or displaced the remainder or reversion, as a feoffment in fee, which would have given an estate to the feoffee in fee, 25, 121; but by that act it is enacted that no assurance shall create any estate by wrong, or have any other effect than the same would have if it were to take effect as a release, surrender, grant, lease, bargain and sale, or covenant to stand seised, as the case may be. Watk. Conv. 81, 82.

Q. 94.—How can an interest in a term of years be surrendered?

A.—It may be surrendered by deed, 29 Car. II. c. 3; 7 & 8 V. c. 7. [U. C. Con. St. c. 90, s. 4.] Watk. Conv. 341. Also, by operation of law, as if the lessee accept a new lease, 337.

Q. 95.—What was the effect of a warranty, and how has it been affected by recent statutes?

A.—Under a warranty the feoffor, and also his heirs, were bound, not only to give up all claims to the lands themselves, but also to give to the feoffee, or his heirs, other lands of the same value, in case of the eviction of the feoffee or his heirs by any person having a prior title. The chief force and effect of a warranty have been removed by clauses of two recent statutes, 3 & 4 W. IV., c. 27, s. 39, and 3 & 4 W. IV., c. 74, s. 14, the former of which enacted that no warranty should defeat any right of entry or action for the recovery of land, and the latter, that warranties of land should be absolutely void against the issue in tail and all persons whose estates are to take effect after the determination or in defeasance of the

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estate tail, 366. [Similar enactments have been made in Upper Canada by 4 W. IV., c. 1, s. 2—U. C. Con. St., c. 27, s. 80, and 9 V., ch. 11, s. 2—U. C. Con. St., c. 83, s. 3.]

Q. 96.—What are the statutory requirements with reference to leasehold interests?

A.—By the Statute of Frauds, 29 Car. II., c. 3, s. 1, it is required that leasehold interests shall be created in writing, signed by the parties making the same, or their agents thereunto lawfully authorized by writing; but an exception is made to the effect that leases may be made by parol if the term do not exceed three years from the making thereof, and if the rent reserved amount to two-thirds at least of the full improved value of the land, 326. By 8 & 9 V., c. 106, s. 3, it is required that a lease required by law to be in writing of any tenements or hereditaments shall be void at law, unless made by deed, 327. [A similar enactment is contained in U. C. Con. St., c. 90, s. 4.]

Q. 97.—How far is a covenant [for re-entry] affected by a license once given for a breach of it?

A.—If an express license be once given by the landlord for the breach of any covenant, or if the covenant be not to do a certain act without license, and license be once given by the landlord to perform the act, the right of re-entry is gone forever; because every condition of re-entry is entire and indivisible, and as the condition has been waived once it cannot be enforced again, 332.

Q. 98.—What limitations exist with respect to executory interests in land?

A. The law has fixed the following limit to the creation of executory interests: it will allow any executory estate to commence within the period of any fixed number of now existing lives, and an additional term of twenty-one years, allowing further for the period of gestation, should gestation actually exist; this additional term of twenty-one years may be independent or not of the minority of any person to be entitled; and if no lives are fixed on, then the term of twenty-one years only is allowed; but every executory interest which might, in any event, transgress this limit, will from its commencement be absolutely void; 262.

Q. 99.—What are the requisites of a will of realty?

A.—A will of realty must be in writing and signed by the testator, or by some other person in his presence and by his direction,

See 299 P. 12
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R. 30. c. 136

and such signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses must attest and subscribe the will in the presence of the testator; 7 W. IV. and 1 V., c. 26. 168. [In Upper Canada, by 4 W. IV., c. 1, s. 51—U. C. Con. St., c. 82, s. 13, a will must be executed in the presence of two or more witnesses, who must subscribe their names in the presence of each other, although they need not subscribe in the presence of the testator.]

Q. 100.—How may estates tail be effectually barred?

A.—By a deed executed by the tenant in tail, enrolled in the Court of Chancery within six calendar months after execution, 48 and note (s.) [As to barring of estates tail in Upper Canada, see answer to Q. 89.]

Q. 101.—Distinguish between a use and a trust.

A.—A use is a legal, a trust an equitable estate; the former arises by virtue of the Statute of Uses, 27 H. VIII., c. 10, whereby lands conveyed to one person for the use, confidence or trust of another, are vested in the latter as fully as if they had been conveyed directly to him; but if lands be conveyed to one person to the use of another to the use of a third, by the construction placed upon the Statute of Uses, the legal estate is vested in the intermediate party,—but here equity interferes, and compels him to hold as a *trustee* for the benefit of the third party; 129 et seq.

Q. 102.—What changes have been effected by statute in the mode of conveying or assuring an estate?

A.—By the Statute of Frauds, 29 Car. II., c. 3, it is in effect rendered necessary that a feoffment should be put into writing, signed by the party making the same, or his agent lawfully authorized in writing. By Statute 8 & 9 V., c. 106, it is provided that a feoffment, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed, 126. [And see U. C. Con. St., c. 90, s. 3.] In modern times, down to the year 1841, the kind of conveyance employed on every ordinary purchase of a freehold estate was a lease and release. By Statute 4 & 5 V., c. 21, a release was made as effectual as a lease and release. By Statute 7 & 8 V., c. 76, freehold land might be conveyed by deed without livery of seisin or a prior lease. By Statute 8 & 9 V., c. 106, s. 2, it is provided that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof,

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be deemed to be in grant as well as livery : a simple deed of grant is therefore sufficient to convey the freehold or feudal seisin of all lands, 146. [See U. C. Con. St., c. 90, s. 2.]

Q. 103.—Wherein does the law of Upper Canada differ from that of England as to dower?

A.—By Imperial Statute 3 & 4 W. IV., c. 105, where lands have been absolutely disposed of by the husband in his lifetime or by his will, the widow shall not be entitled to dower ; the husband also may either wholly or partially deprive his wife of her right to dower by any declaration for that purpose made by him, by any deed, or by his will, 193, 194. In Upper Canada the husband has no such power over his wife's right to dower, which, however, may be barred by her by joining with her husband in a deed or conveyance thereof, in which a release of dower is contained ; or by executing, either alone or jointly with other persons, a deed or conveyance to which her husband is not a party, containing a release of her dower, in which case she must be examined touching her consent to be barred of her dower by certain judicial officers, who must certify on the back of the deed that she consents to be barred of her dower in the lands in the deeds mentioned, freely and voluntarily, without coercion or fear of coercion on the part or her husband, or of any other person ; U. C. Con. St., c. 84, ss. 4—10.

Q. 104.—What estate has a tenant for life ?

A.—A tenant for life has a freehold estate, and this is the smallest freehold estate which can be held, 22.

Q. 105.—What acts of the vendor will destroy the lien for the unpaid purchase money?

A.—If the vendor take a mortgage of part of the estate, or any other independent security, his lien will be gone, 359 ; but see Story Eq. Juris., § 1226 and note.

Q. 106.—What was enacted by the Statute *Quia emptores* ?

A.—It was enacted that any freeman (but not the King's tenant *in capite*), might at his own pleasure sell his lands and tenements or part thereof, so nevertheless that the feoffee, or purchaser, should hold the same of the same chief lord of the fee, and by the same services and customs, as his feoffor held them before ; and that upon such a sale of part, the services should be apportioned to the part sold ; 56, 95.

Q. 107.—What is a tenant in special tail ?

A.—A tenant in special tail is one who holds an estate tail descendible to certain heirs of his body, and not to all of them generally; as where an estate is limited to a man and the heirs of his body by a particular wife, in which case none can inherit but his issue by the wife specified, 30.

Q. 108.—Of what estate does escheat arise, and of what not?

A.—An escheat may arise of an estate in fee simple, 102; but not of an equitable estate, for such an estate is not the subject of tenure, 138; nor of a rent-charge, or other similar estates, which are not the subject of tenure, 278. Escheat also arises of a copyhold estate in fee simple, 303.

Q. 109.—How may a lease for a term of years be made valid by estoppel?

A.—If lands be leased for a term of years by indenture, by one who has no legal interest in the lands, both lessor and lessee will be estopped during the term from denying the validity of the lease and if the lessor during the term acquire the lands he has so let, the lease will take effect out of the newly acquired estate of the lessor, and will become for all intents and purposes a regular estate for a term of years, 329.

Q. 110.—What is the doctrine of *cy près*? and give an instance.

A.—Where attempts have been made by testators to settle their property on future generations beyond the bounds allowed by law, as where lands have been given by will to the unborn child of some living person for life, and after the decease of such unborn child, to *his* sons in tail, (which latter limitation is void, 228,) the courts of law have been so indulgent to the ignorance of testators, that in such case they have endeavoured to carry the intention of the testator into effect *as nearly as can be done* without infringing the rule of law limiting the creation of future estates, by altering his will to what they presume he would have done had he been acquainted with that rule: thus in the case put, the courts will give to the unborn child, not a life estate, but an estate in tail; 229, 230.

Q. 111.—In what respects do powers of alienation unconnected with ownership, differ from alienations in respect of ownership?

A.—The former are of a less ancient date, and are free from some of the incumbrances by which the latter are clogged: thus, a man may exercise a power of appointment in favour of himself

or of his wife, though he cannot convey by virtue of his ownership, directly to himself or his wife, and a married woman may exercise a power of appointment without her husband's consent, though she could not without his consent convey by virtue of her ownership, 250.

Q. 112.—Distinguish between a demise and a grant.

A.—A demise implies an absolute covenant for the quiet enjoyment of the lands by the lessee during the term, 367; a grant does not imply any covenant, except where by force of any Act of Parliament a covenant may be implied, (as in the case of conveyances to the Governors of Queen Anne's Bounty, by stat. 1 & 2 V., c. 20, s. 22;) 8 & 9 V. c. 106, s. 4. 368. [See U. C. Con. Stat. c. 90, s. 10.]

Q. 113.—Is a purely incorporeal hereditament the subject of tenure? and give reasons for your answer.

A.—Such an estate cannot be the subject of tenure, because it is accessory or incident to no other hereditament, 278.

Q. 114.—State the proceedings upon a common recovery.

A.—A common recovery was a fictitious suit by which estates tail were anciently barred. The proceedings by which this was done were as follows: the lands were in the first place conveyed by a deed called the recovery deed, to a person against whom the action was to be brought and who was called the tenant to the *præcipe* or writ. A regular writ was then issued from the Court of Common Pleas against the tenant to the *præcipe* by another person called the *demandant*; the tenant in tail was then required by the tenant to the *præcipe* to warrant his title according to a supposed engagement for that purpose; this was called vouching the tenant in tail to warranty: the tenant in tail on being vouched then vouched to warranty in the same way the crier of the court who was called the common vouchee: the *demandant* then craved leave to imparl or confer with the last vouchee in private, which was granted by the court, and the vouchee having thus got out of court, did not return; in consequence of which judgment was given for the *demandant* to recover the lands from the tenant in tail, upon which a regular writ was directed to the sheriff to put the *demandant* in possession; 42.

Q. 115.—State the classes of persons not possessing the ordinary rights of alienation of real estates.

A.—Infants, idiots, lunatics, and married women; also persons attainted for treason or felony, 59, 60.

Q. 116.—State the classes of objects in respect of which these rights are restricted.

A.—By Stat. 9 Geo. II., c. 36, no estate or interest of any kind in land can be conveyed for *charitable purposes* (except to a few favoured institutions), unless by deed indented, sealed and delivered in the presence of two or more credible witnesses, and enrolled in the Court of Chancery within six calendar months after execution; and unless the same be made to take effect instantly, and be irrevocable and without any reservation or trust in favor of the donor; and if not made *bonâ fide* and for good consideration, it will be void if the donor die within twelve calendar months after execution. No conveyance can be made to a *corporation* unless a license to take lands has been granted to it by the Crown. 60, 61.

Q. 117.—State the distinction between a will of lands and a will of personal estate regarding them as documents of title.

A.—A will of real estate is the proper evidence of title, and not the probate, Watk. Conv. 368; but the title to personalty can only be proved by the probate, or by an exemplification of the record of the grant thereof, if it has been lost, 2 Tayl. Evid. 1223, 2 ed.

Q. 118.—How can a person seized in fee simple convey so as to vest the fee in himself and another as joint tenants?

A.—He may convey to the other and his heirs to the use of that other and himself and their heirs, and a joint estate in fee simple will then vest in them both by the operation of the use, 155.

Q. 119.—Explain the law of Hotchpot, and the effect of the statute of this Province on the subject.

A.—Where property is descendible to several persons equally, as coparceners, if one of them has received a portion of it from the intestate during his lifetime, he cannot claim a share of the property which has descended without putting the portion which he has received into hotch-pot, that is, he must give up his portion to be divided together with the property so descended, 2 Bl. Com. 191. By U. C. Stat. 14 & 15 V. c. 6, ss. 20, 21—U. C. Con. St. c. 82, ss. 42, 43, it is enacted that if any child of an intestate shall have been advanced by the intestate by settlement or portion of real or personal estate, or both of them; and if such advancement

be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, such child and his descendants shall be excluded from any share in the real and personal estate of the intestate; or, if such advancement be not equal to such share, then such child and his descendants shall be entitled to such a share only of the intestate's real and personal estate as will make together with the value of such advancement, a share equal to that which he would have inherited if there had been no advancement.

Q. 120.—A lease to A. for life, remainder to B. for life; is this a vested or contingent remainder?

A.—It is a vested remainder, for it is one which is ready to become an estate in possession immediately upon the determination of the life estate of A. 207, 222.

Q. 121.—A. leases lands to B., and in the lease B., covenants with the lessor for himself and assigns to dig a well on the demised premises during the second year of the term; B. during the first year assigns to C.; the well is not dug at any time. Can the lessor sue both B. and C., or which?

A.—He may sue B., who is bound to him by his covenant, notwithstanding the assignment, 330; and he may sue C., because a covenant so made by the lessee for himself *and assigns* to do an act upon the demised premises, is one which runs with the land, and so is binding upon the assignee, 331.

Q. 122.—A. conveys lands to B., in 1861, who does not register the conveyance; A. subsequently conveys to C., who does register; what must C. prove beyond conveyance to establish priority over B., in ejectment against him?

A.—He must shew that he is a *bonâ fide* purchaser for value without notice.

Q. 123.—An estate is conveyed to A. and B. in fee in trust to sell; do the grantees take as joint tenants or tenants in common? Give the reasons for your answer.

A.—They take as joint tenants, as they have unity of interest, unity of title, and unity of time of the commencement of the title; and they are well made joint tenants, as their only interest is that of the *cestui que trust*, and the right of survivorship consequent upon the joint tenancy, enables the interests of the *cestui que trust* to be observed more effectually than could be done if the legal

estate of one of them were descendible upon his death, 100, 111. [Our statute 4 W. IV., c. 1, s. 48—U. C. Con. Stat., c. 82, s. 10, which enacts that upon a conveyance or devise to two or more persons, they shall take as tenants in common, expressly excepts trustees.]

Q. 124.—Does the law recognize an absolute ownership in real estate? Give reasons for your answer.

A.—The English law does not recognise absolute ownership of lands by a subject, for it is a fundamental rule that all lands within the realm were originally derived from the Crown (either by express grant or tacit intendment of law,) and therefore the Queen is sovereign lady, or lady paramount, either mediate or immediate, of all lands within the realm; and this may be accounted for upon feudal principles, (upon which our law of real property is founded,) by which all lands were held of the Crown, either immediately or through the king's tenants *in capite*, 2, 17, 95. [See answer to Q. 83.]

Q. 125.—Mention the incidents of the usual covenants in an indenture of lease.

A.—Covenants directly relating to the premises are said to run with the land, that is, they are binding upon the assignee, whether of the leasehold or of the reversion. Covenants are either *express*, or entered into especially, or *implied*, where they are not so expressly entered into, but are imposed by the law upon the parties, as a covenant for quiet enjoyment or to pay rent: all covenants of the latter class run with the land; express covenants run with the land when they relate to the land and the tenancy of it, but not (it would seem) where they are merely collateral and affect only the person of the party entering into them, 330, 331. Watk. Conv. 314 et seq. See Spencer's case. 5 Co. 16. [For examples of covenants running with the land, see answer to Q. 73.]

Q. 126.—Can one person have more than one estate in the same land at the same time? Answer fully.

A.—As a general rule, where a greater and a less estate coincide in the same person, the less estate merges in the greater; but by the statute *De Donis*, 13 Edw. I. c. 1, an estate tail is excepted from this rule; so that a person can have at the same time, an estate tail, and also the immediate reversion or remainder in fee simple, expectant on the determination of such estate tail by fail-

ure of his own issue, 234. A man may also have more than one estate in lands, where there is an intervening estate which prevents the merger: as if a deed be made to A. for his life, and after his decease to B. for his life, and after his decease to the heirs of A., A. will have in possession a life estate, and in remainder, expectant on the decease of B. (by the rule in *Shelley's case*), an estate in fee simple; 213.

Q. 127.—Give instances of technical rules, or canons, which obtain, in the construction of wills, even against the intention of the testator.

A.—Where the testator uses technical words, the will requires a technical construction; thus where a testator declares his intention to be, that his son should not sell or dispose of his estate for a longer time than his life, and to that intent he devised the same to his son for life, and after his decease, to the heirs of the body of his said son, it was held that such a limitation gave the son an estate tail, and therefore he was enabled, by barring the entail, to dispose of the lands in fee simple, 175. Similarly a devise to a person without words of limitation was held to give only a life estate, unless some technical word were used, such as the word *estate*, 19; (but this is now otherwise, for by 7 W. IV. & 1 V. c. 76 [and in Upper Canada by 4 W. IV. c. 1, s. 50—U. C. Con. St. c. 82, s. 12] a devise without words of limitation is considered to convey the same estate which the testator had in the lands.) Where lands were given to one person, "and in case he should die without issue," then to another, those words were interpreted "in case of his death, and of the failure of his issue," so that the estate was to go over to the other, not only in case of his death leaving no issue living at his decease, but also in the event of his leaving issue and the issue afterwards failing, the estate being in fact an estate tail to the first person, with remainder over to the other, so the first person was enabled to acquire the fee simple, 177; (this rule also has been changed by the same (Imperial) act, such a limitation being now considered to mean failure of issue during the lifetime, or at the death of the party.)

Q. 128.—What is meant by an innocent conveyance?

A.—An innocent conveyance is one which does not operate by wrong; thus a grant is an innocent conveyance, for if a tenant for life purported to convey the fee simple by a grant, his own life in-

terest only would pass, and no injury would be done to the reversioner; but if (before the Stat. 8 & 9 V. c. 196, s. 4) he had made a feoffment of the lands for an estate in fee simple, the feoffment would have operated by wrong, and conveyed the whole estate to the feoffee, to the prejudice of the reversioner, 164, 122.

WATKINS ON CONVEYANCING.

Question 1.—How many kinds of estates tail are there? Describe them.

Answer.—Two; estates tail *general* and estates tail *special*. The former is where an estate is limited to a man, and the heirs of his body; the latter is where an estate is limited to a man and certain particular heirs of his body. 108.

Q. 2.—Give the several instances of estates tail special, and how they may arise.

A.—An estate limited to a man and the heirs of his body by a certain woman, or to a woman and the heirs of her body by a certain man, or to man and woman (husband and wife), and the heirs of their bodies, or to the heirs male of the body of a man or woman or to the heirs female of the body of a man or woman; and these may severally arise by the special words of limitation; 108, 109.

Q. 3.—Illustrate a cross remainder by an example.

A.—Under a gift to A., B. and C., as tenants in common in tail and in default of the issue of either of them, then to the other or others of them as tenants in common in tail, and in default of issue of all of them, then to a stranger in fee: A., B., and C. are tenants in common of one-third each in possession, with remainder as to A. to B. and C. as tenants in common in tail, with remainder as to B. to C. in tail, with remainder as to C. to B. in tail, and so reciprocally as to the other two-thirds; 199.

Q. 4.—What is the nature of the estate of a mortgagor in possession?

A.—*First*, Where there is an express agreement that the mortgagor shall retain possession until default in payment of the mortgage money at a particular period, he is a tenant to the

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mortgagee, holding an interest in the nature of a term of years. *Secondly*, Where there is such an agreement, but the money is not paid when due, the mortgagor continuing in possession after default without any new agreement between him and the mortgagee, may be, until payment of interest, considered either as a tenant at sufferance to the mortgagee, or be looked upon by him as a trespasser. *Thirdly*, Where there is originally no such agreement, the mortgagor being the occupant and remaining in possession with the consent of the mortgagee, should be considered as tenant at will. *Fourthly*, In such case the assignment of the mortgage without the concurrence of the mortgagor, would determine the tenancy at will, and the mortgagee would become tenant at sufferance to the assignee, until payment of interest. So also, the death of either mortgagor or mortgagee determines the tenancy at will; in case of the death of the latter, the mortgagor becomes tenant at sufferance to his representative, until payment of interest; upon the death of the mortgagor, if his heir or devisee enters, without any recognition of the mortgagee's title, an adverse possession takes place. *Fifthly*, In such latter case and in the case of a tenancy at sufferance, payment of interest would create a tenancy at will. *Sixthly*, Where the estate is in the occupation of tenants and the mortgagor is in receipt of the rents, without any agreement in the mortgage that he is to receive rents, there is no tenancy existing between him and the mortgagee, but he is to be considered merely as a receiver, without liability to account. 13—15.

Q. 5.—Distinguish between *forfeiture* and *escheat*.

A.—Between *forfeiture* and *escheat* there is this difference: forfeiture is a punishment for a malignant offence; escheat arises from an obstruction in the course of descent: the former is personal to the offender; the latter respects his successor: forfeiture affects the rents and profits only; escheat operates on the inheritance; 496, 497.

Q. 6.—Distinguish between chattel and freehold interests.

A.—Estates at will and for years are considered by law as only chattel interests; an estate for one's own life, or the life of another person, or any greater estate, is deemed an estate of freehold: in the tenant of the latter estate the feudal possession or seisin is vested; and the tenants of the former are regarded as only the bailiffs or farmers of their respective lessors, 61.

Q. 7.—Can a lease created by deed be surrendered by cancellation?

A.—A lease created by deed cannot be surrendered simply by cancellation, for a surrender of such a lease is void unless made by deed, 341. See Imp. St. 7 & 8 V., c. 76, s. 4; a similar enactment is contained in 14 & 15 V., c. 7, s. 4.—U. C. Con. St. c. 90, s. 4.

Q. 8.—By what means may an entail now be barred, and can this be effected in all cases of estates tail?

A.—By Imp. Statute 3 & 4 W. 4, c. 74, (which confers powers of disposition upon persons entitled to estates tail and base fees), an estate tail may be barred whether legal or equitable, in possession, remainder, or contingency, by feoffment, lease and release, bargain and sale, grant or covenant to stand seised, according to the circumstances of the estate, and the object of the parties, but not by executory contract or will; such assurance to be enrolled in the Court of Chancery within six calendar months from its execution. But this cannot be effected if the tenant in tail be a woman seised *ex provisione viri*, under 11 H. 7, c. 20, by virtue of a settlement made before the passing of the act; nor as to reversions in the Crown, under 34 & 35 H. 8, c. 20. 127—129. [As to the barring of estates tail in this Province we would refer the student to U. C. Con. St. cap. 83.]

Q. 9.—Can a tenant in tail make leases to be binding on any one else than himself, and on whom; and by what authority of Law, and on what conditions?

A.—By the Statute 32 H. 8, c. 28, a tenant in tail is enabled to make a lease for three lives, or twenty-one years, to bind his issue, and upon the following conditions: 1. The lease must be by indenture, and not by deed poll or parol; 2. It must begin from the making or day of the making, and not at any greater distance of time; 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring; 4. It must be either for twenty-one years or three lives, and not for both; 5. It must not exceed the term of three lives or twenty-one years, but may be for a shorter term; 6. It must be of corporeal hereditaments, and not of such things as lie merely in grant; 7. It must be of lands and tenements most commonly letten for twenty-one years past; 8. The most usual and customary feorm or rent,

for twenty-one years past, must be reserved yearly on such lease; and 9. Such lease must not be made without impeachment of waste. 479. See 2 Black. Com. 319.

Q. 10.—What is an equity of redemption, and how long does it continue open?

A.—If a person convey lands to another on condition, as a security for money, and the condition be broken, he may, under certain circumstances, *redeem* the premises; and this privilege is denominated his *equity of redemption*; 231. This right continues open for twenty years from the time it arises, or after the last acknowledgment of it made by the mortgagee; beyond that time the mortgagor is forever barred of relief in equity; 231, note. Coote Mortg. 520. See U. C. Con. St. c. 88, s. 21.

Q. 11.—Describe forcible entry.

A.—A forcible entry is such as is made with a strong hand with unusual weapons, an unusual number of servants and attendants, or with menace of life or limb, 225. See Toml. L. Dic. tit. *Forcible Entry*.

Q. 12.—What are the principal Statutes in force in this country relating to conveyancing?

A.—“An Act respecting the conveyance of Real Estate by married women,” Con. Stat. U. C. c. 85. “An Act respecting the short forms of conveyancing,” Con. Stat. U. C. c. 91; also sec. 63, U. C. Con. Stat. c. 12, relating to vesting orders.

Q. 13.—What is meant by a “perpetuity?” Give a general exposition of the rule against perpetuities, and the principles on which it is based.

A.—A perpetuity is, where an estate is so tied up that though all who have interest should join in the conveyance, yet they could not bar or pass the estate, Toml. L. Dic. tit. *Perpetuity*. The rule against perpetuities is that an executory estate cannot be made to commence after a longer period than any fixed number of now existing lives, and an additional term of twenty-one years; allowing further for the period of gestation, should gestation actually exist. This rule arose from the usual practice of settling real estates to the husband for life, with remainder to his sons successively in tail; which being allowed, renders the estate inalienable during the existence of a life in being, and twenty-one years after,—that is, till the son of the tenant for life attains his full age: from one

life the courts gradually proceeded to several lives in being at the same time, for this in fact only amounted to the life of the survivor; and as it might happen that a tenant for life, to whose unborn son an estate was limited, might die leaving his wife *enceinte*, an allowance was also made for the time of gestation of a posthumous son:—hence the period allowed by the rule. It was formerly a matter of much discussion, but is now settled by the decision in *Cadell v. Palmer*, (10 Bing. 140; 1 Clark & Fin. 372,) in the House of Lords, that this term of twenty-one years may be independent or not of the minority of any person to be entitled. The object of the rule is to prevent, or rather, to control, the placing of restraints upon the alienation of real estate, it being the policy of our law—(and manifestly a correct one, in a commercial country)—to favour free powers of alienation. 204 *et seq.* Will. R. Pro. 262 and note. 1 Jarm. Wills 220 *et seq.*

Q. 14.—In whom does the legal estate vest if on a conveyance by bargain and sale, a use is limited to a person other than the bargainee? Give the reason for your answer.

A.—The legal estate vests in the bargainee; because in a bargain and sale a use cannot be limited to any but the bargainee; for, till enrolment, the bargainee has but a use, and he cannot be seised of a use to the use of another person, 249.

Q. 15.—What is a power simply collateral?

A.—A collateral power is such as is given to a stranger; that is, to a person who has neither a present nor future estate or interest in the lands, 269.

Q. 16.—What are the principal incidents to a tenancy in tail?

A.—They are these: 1. That a tenant in tail may commit waste on the estate tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same; 2, that the wife of the tenant in tail shall have her dower, or thirds, of the estate tail; 3, that the husband of a female tenant in tail may be tenant by the *courtesy* of the estate tail; 4, that an estate tail may be barred, or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir; see 2 Black Com. 115.

Q. 17.—Mention the different kinds of freehold estates, and how and by what acts they may severally be forfeited.

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in fee simple may be forfeited for treason, murder, and felony, 138. An estate in fee tail, for high treason, Will. R. Pro. 51. And an estate for life may be forfeited by any act which divests, or displaces the remainder, or reversion, 81.

Q. 18.—May freehold or leasehold estates be made under any and what circumstances to commence *in futuro*?

A.—At common law freehold estates could not be made to commence *in futuro*, as the feudal seisin was not permitted to be at any time without an owner; but this may now be done by effect of the Statute of Uses, by means of an executory devise or future use, where the estate is so to commence within the period of any fixed, number of existing lives, and an additional term of twenty-one years, allowing further for the period of gestation in the case of posthumous birth; 63, 205, 251; Will. R. Pro. 262. Leasehold estates may be made to commence *in futuro*; 2 Bl. Com. 43.

Q. 19.—What is the power of a testamentary guardian?

A.—A testamentary guardian has the custody and management of the lands and goods of the infant whether descended to him from his father, or in any way acquired or purchased by him, 483.

Q. 20.—What are the requisites for the creation of such a use as will be executed under the statute of uses?

A.—It is necessary to the creation of such an use as may be executed by the statute, that there be a person to stand seised of certain hereditaments to such an use; that there be a person capable of taking that use; and that there be privity of estate and privity of person, 240—242.

Q. 21.—Explain the effect of a conveyance of a fee simple estate to an infant.

A.—Such a conveyance may be valid, being to the advantage of the infant, but he may waive it when he comes of age; or if he do not then actually agree to it, his heirs may waive it after him; 417, 418.

Q. 22.—Give the various parts, together with the covenants of an indenture of lease.

A.—The various parts of a lease are:—1st, the *premises*, including the date, the names of the lessor and lessee, the parcels, which ought to be accurately described, and the exceptions, if any; 2nd, the *habendum* and *tenendum*, ("to have and to hold,") by which the estate or interest of the lessee is limited; 3rd, the *reddendum*,

or clause whereby rent is reserved; and 4th, the *covenants and conditions*. Crabbe, Prec. Conv. 1024-1026. The usual covenants are,—on the part of the lessee, to pay rent, to pay taxes, to keep the demised property in good repair, and to leave them in good repair at the expiration of the term; and he also frequently covenants not to cut down timber, &c., to insure, and not to assign or sublet without the permission of the lessor: the lessor covenants for quiet enjoyment by the lessee under the demise: to the lessor is reserved the power of entering to view the state of repair; also a power of re-entry on non-payment of rent or non-performance of covenants by the lessee. [See U. C. Con. St., c. 92.]

Q. 23.—What is a release, and how many species of release are there? and mention them.

A.—A release is the relinquishment of a right or interest in lands or tenements to another who has an estate in possession in the same lands or tenements. There are five species of release:—1st, *by way of enlargement*, as if he in remainder in fee release to the particular tenant in possession; 2nd, *by way of passing an estate*, as when one co-parcener or joint-tenant releases to the other; 3rd, *by way of passing a right*, as when a disseissee releases to the disseisor; 4th, *by way of extinguishment*, as if a tenant for life makes a greater estate than he is warranted in granting, and the reversioner release to his grantee, or if the lord release to his tenant his seignorial rights; and 5th, *by way of entry and feoffment*, as when a disseissee releases to one of two disseisors. 331-333.

Q. 24.—What is meant by merger? When and how does it take place, and in respect of what estates?

A.—Where two estates, which are immediately reversionary to each other, meet in the same person in one right, the one which gives the title to the possession, except it be an estate tail, will, if it be less in quantity than the one in reversion, merge and become in the latter, 56. A merger may occur of every estate less than an estate in fee simple, except an estate tail, 137.

Q. 25.—Can merger in any way, and how, be relieved against?

A.—Mergers are usually prevented upon a purchase, by the machinery of a conveyance to a trustee of the estate or charge which would otherwise be discharged, for the purpose of preserving its existence; as where a number of terms in the same estate are to be assigned, it is the practice to assign them alternately to two trustees,

—one trustee takes the 1st, 3d, 5th, &c., according to the priority of creation, and the other trustee the 2nd, 4th, 6th, &c.; 56.

Q. 26.—Is there any, and what Provincial Statute relating to merger, and what are its provisions?

A.—By 12 V., c. 71, s. 12, and 14 & 15 V., c. 7, s. 7—Con. St. U. C., c. 90, ss. 7 and 8, it is in effect enacted that merger of the immediate reversion in lands expectant on a lease shall not have the effect of extinguishing the rent and covenants in the lease. The Provincial Statute 14 & 15 V., c. 45, s. 1—Con. St. U. C., c. 87, s. 1, provides that any mortgagee of freehold or leasehold property or any assignment of such mortgagee may take and receive from the mortgagor or assignee a release of the equity of redemption in such property, or may purchase the same under any power of sale in his mortgage, or any adjustment or decree, without thereby merging the mortgage debt as against any subsequent mortgagee.

Q. 27.—With respect to a lease, distinguish between “privity of estate” and “privity of contract.”

A.—Immediately on the execution of the lease, a privity arises between the lessor and lessee, which, if there be any collateral covenants in the lease not implied by law, is called a *privity of contract*, and on that privity the lessee is bound to perform all those collateral covenants, although he should never perfect the lease by entry; when he enters, there arises between him and the lessor a second privity, called the *privity of estate*, and this renders him liable for the covenants implied by law; 314

Q. 28.—What is the effect of a contract to purchase at law and in equity upon the estate of a purchaser?

A.—A contract to purchase, before the Statute of Uses, raised a use, which was converted into a legal estate by an actual conveyance; upon the passing of that statute, the purchaser having the use, had also the legal seisin, and therefore such a contract passed the legal estate; so that such a contract, if enrolled in Chancery within six months, pursuant to 27 H. VIII., c. 16, would perhaps operate as a valid conveyance, but this is doubtful, as that statute requires a bargain and sale to be indented and sealed, 356. In equity, upon a contract to purchase, the purchaser becomes the owner of the property, as to the parties to the contract, but not as to strangers, and the owner holds in trust for him, subject to the

payment of the purchase money ; Dart. Vend. & Purch., 2nd ed., 129, 131.

Q. 29.—Explain the devolution of chattels real, vesting in several executors, one of whom is the last survivor.

A.—Where there are several executors or administrators, the chattels real of their testator or intestate do not devolve upon them as joint-tenants ; but whether many or few, in the eye of the law they take as one person, representing the testator or intestate, and having a several as well as a joint dominion over the whole of his effects ; see Touch. 484. It follows, therefore, that the survivor equally represents the deceased, and this representation devolves upon the executor of the last surviving executor who has proved, and so on, to the last surviving executor of the last of the series of executors. 484, 485.

Q. 30.—In what case before the wills act would an estate in fee simple pass by a devise even without words of limitation ?

A.—Prior to the wills act, the mode of evading the common law restraints on testamentary dispositions was by making a feoffment to A., his heirs and assigns, to such uses as the feoffor should appoint ; the appointment usually contained a power of revocation, when it did not confer an immediate interest, so that the power was in fact kept open till the appointor's death. In effect this mode of evading the common law was equivalent to the will of the present day, and was generally used in the same manner, and for the same purposes. 246, n.

Q. 31.—What is a power in gross ?

A.—A power in gross is where the person to whom it is given has an estate in the land, but the estate to be created under, or by virtue of, the power, is not to take effect till after the determination of the estate to which it relates, 270.

Q. 32.—Of what property is a deed of "grant" the appropriate form of conveyance at common law ?

A.—A *grant* at common law is appropriated to the conveyance of things *not in possession*, as reversions and remainders, and other incorporeal hereditaments, 302.

(Hence the law divided estates in those which lay in *livery* and those in *grant*, the former being corporeal and the latter incorporeal hereditaments ; but our statute 14 & 15 V., c. 7, s. 2—Con. St. U. C., c. 90, s. 2, enacts that all corporeal hereditaments shall, as

regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery; therefore a conveyance of such corporeal hereditaments may now be made by deed of grant.)

Q. 33.—Can an estate for years be in any mode, and how, so limited to A. for life with remainder over to B. and the heirs of his body, that the first taker cannot defeat the remainder? If an estate to C. and his heirs were limited after the limitation to B. and the heirs of his body, what estate would C. take?

A.—An estate for years may be *devised*, or limited *by way of trust*, to A. for life, and after his decease to B. and the heirs of his body; and A., the person taking the preceding limitation for life, cannot defeat the limitation, or remainder over; and the whole property in the term will vest *absolutely* in B., the person who takes under the limitation; hence the limitation over to C. must fail; 43.

Q. 34.—If there is a conveyance by deed of bargain and sale to A. and his heirs, to such uses as A. shall appoint, and in default of appointment, to the use of A. and his heirs, and A. executes an appointment to B. and his heirs, does B. take any, and what estate at law? Give reasons for your answer.

A.—A bargain and sale cannot contain a power of appointment, because, to support a bargain and sale, a money consideration must pass between the bargainor and bargainee, and to the perfection of the instrument the consideration must be paid at the time the deed is executed, otherwise no use will arise, and nothing passes from the bargainor, and so the deed is completely nugatory at the time it is executed; now between the bargainor and appointee under a power there cannot pass a present consideration, and consequently no use can arise; and as the seisin and the use are not separated the statute cannot operate, consequently nothing is drawn out of the bargainor, neither the use by the deed, nor the seisin by the statute; therefore B. takes no estate at law; 357, 358.

Q. 35.—What estate will pass under a conveyance by bargain and sale to A. and his heirs by tenant in tail in remainder, without the consent of the protector of the settlement?

A.—A base fee will pass to A. by the conveyance, and the estate continues until it be avoided by the issue in tail by entry, 117. See *Machell v. Clarke*, 2 Lord Raymond, 778.

Q. 36.—What are the distinctions (five in number) between an executory devise and a contingent remainder?

A.—The five points in which an executory devise differs from a contingent remainder, are: 1st, An executory devise is admitted only in last wills and testaments; 2nd, An executory devise respects personal estate as well as real; 3rd, An executory devise requires no preceding estate to support it; 4th, When any estate precedes an executory devise, it is not necessary that the executory devise should vest when such preceding estate determines; and 5th, An executory devise cannot be prevented or destroyed, by any alteration whatsoever in the estate out of which or after which it is limited. 202.

Q. 37.—What estates may be successfully limited by way of executory devise?

A.—A fee or less estate may be limited after a fee, either absolute or base, provided the rule against perpetuities be not infringed; (see answer to Q. 13), 204; this could not be accomplished by any other means; see Will. R. Pro. 208, 243. A fee may so be limited to commence *in futuro*; as, till such fee shall take effect, the inheritance shall descend to the right heirs of the testator, 205.

Q. 38.—Explain the term "without impeachment of waste."

A.—*Impeachment of waste* signifies a restraint from committing waste upon lands or tenements; or a demand of recompense for waste done by a tenant who hath but a particular estate in the land granted: and he that hath a lease to hold without impeachment of waste, hath by that such an interest given him in the lands or tenements, that he may make waste without being impeached for it; that is, without being questioned, or any demand of recompense for the waste done. See 11 Co. 82, b.

Q. 39.—What is the provision of the Statute of Frauds relative to the creation of a trust?

A.—By the Statute of Frauds, 29 Car. II. c. 3, s. 7, it is enacted: that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void, and of none effect. By sec. 8, trusts arising by implication of law are excepted, but all assignment of trusts must be in writing. 486.

Q. 40.—Define a fee simple, and state what are its properties.

A.—An estate in fee simple is a freehold estate limited to a person and his heirs, general or indefinite: that is, not confined to any particular line or species of heirs, but limited to the heirs generally: and it is the highest estate which the law acknowledges in a subject. The properties of such an estate are,—1, an unlimited power of alienation by deed or will; 2, an uncontrollable power in the commission of waste; 3, liability to dower and courtesy; 4, liability to debts by speciality and simple contract; 5, descent to the heirs general, according to the laws of inheritance; 6, escheat to the lord of the manor for want of heirs; and 7, forfeiture for treason, murder and felony. 137, 138, and notes.

Q. 41.—Give a definition of "emblemments."

A.—Strictly speaking, the word emblemments signifies the profits of the land sown with corn; and the word has been extended to include other annual artificial profits, as hemp, roots, and the like, 3. See Toml. L. Dic. tit. *Emblemments*; also Will. Real Pro. 25, 325.

Q. 42.—When does a tenancy by entireties arise?

A.—Where an estate is during their coverture conveyed or devised to a man and his wife, they are said to be tenants by entireties, that is, each is said to be seised of the whole estate, and neither of a part, 177.

Q. 43.—What liability does the mortgagee of leasehold incur in respect of the covenants on the part of the mortgagor contained in the lease? Does this liability arise from privity of estate or privity of contract?

A.—The mortgagee incurs a liability in respect of all covenants in law and in deed that run with the land, 319. The privity of estate exists no longer than the relation of landlord and tenant, consequently this liability arises from privity of contract, 317.

DART ON VENDORS AND PURCHASERS.

Question 1.—When is time of the essence of a contract at law and in equity respectively; and when not originally of the essence of the contract, can it, and by what means, be made so?

Answer.—At law, the time fixed for completion is of the essence of the contract, and the vendor must deduce and verify a market-

able title by the time agreed upon : if no time be fixed, a reasonable time will be allowed, 232, 513. *Berry v. Young*, 2 Esp. 640, n. In equity, although unreasonable delay will of itself conclude either party, the mere fact of the time fixed for completion having expired, is no defence to a suit for specific performance ; except where time has been made of the essence of the contract by express agreement ; or where, from the circumstances of the case, such must clearly have been the intention of the parties ; 232 ; *Coslake v. Till*, 1 Russ., 376 ; see *Doloret v. Rothschild*, 1 Sim. & Stu. 590. Where time has not originally been of the essence of the contract, either party may, by proper notice, bind the other to complete within a reasonable specified period, 235. *Stewart v. Smith*, 6 Hare, 223.

Q. 2.—Are parol contracts relating to land enforceable, and under what circumstances ?

A.—The Statute of Frauds, 29 Car. II. c. 3, s. 4, requires all contracts for the sale or purchase of lands, tenements or hereditaments, or any estate or interest in or concerning them to be put in writing, 102 ; but parol contracts will be enforced in certain cases, upon the ground, 1st, of fraud having been the cause of the non-compliance with the requisitions of the statute ; 2ndly, of the parol agreement having been in part performed ; or 3rdly, of its existence being admitted by the defendant ; 539. *Whitchurch v. Bevis*, 2 Bro. C. C. 565 ; *Attorney General v. Day*, 1 Ves. sen. 220.

Q. 3.—What is the effect upon the rights of both parties respectively of property being in some important particular misdescribed in a written contract for the sale thereof ?

A.—A misdescription, if wilful or designed, amounts to fraud, and avoids the contract as regards the purchaser ; if it arise simply from negligence, equity will refuse a specific performance at the suit of the vendor,—notwithstanding any condition in the agreement for sale that misdescription shall not avoid the contract, but merely be a subject for a compensation, if the error be not such as may be compensated ; at law it has been held that negligence without fraud, did not excuse the purchaser from his liability, but it is now settled, that if the misdescription be material, the contract is avoided. *Flight v. Booth*, 1 Bing. N. C. 370, 377. 70, 71.

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Q. 4.—What is the effect in equity and at law respectively of a puffer being employed at an auction sale of lands?

A.—In equity, unless the property be expressly or impliedly offered for sale without reserve, it appears that the employment of a bidder to prevent its going at an undervalue is allowable; but a bidder for the purpose of enhancing the price indefinitely, or more bidders than one, would not be allowed. *Woodward v. Miller*, 2 Coll. 279; *Smith v. Clarke*, 12 Ves. 483. At law the question is unsettled, but in a recent case (*Thornett v. Haines*, 15 M. & W. 371, 372,) the Barons of the Exchequer laid it down that the employment of a puffer would vitiate the sale at law, unless the intention to do so were expressly notified. 100, 101.

Q. 5.—State briefly the effect of a contract for the sale of land upon the rights of the vendor and vendee respectively.

A.—Upon the making of a binding contract for the sale of land, the vendor holds the land in trust for the vendee, subject to the payment of the purchase money, and the vendee is, as a general rule, under a personal liability, both legal and equitable, for payment of the purchase money to the vendor, 129.

In equity, the vendee becomes the owner of the property as between himself and the vendor, but not as to strangers to the contract; and is entitled to everything forming part of the inheritance, so that the vendor cannot remove ornamental timber or the like; and he also has the benefit of any improvements which may happen after the date of the contract, and must bear any loss which may occur in respect of it without the fault of the vendor; 130—133.

The vendor has a lien upon the estate for the unpaid purchase money; the vendee in possession will therefore, until payment, be restrained from doing any act by which the vendor's security may be lessened. A registered judgment against the vendor, subsequent to the contract, is a lien upon the unpaid purchase money; [but not in Upper Canada, as the registering of judgments has been abolished by 24 V. c. 41]; and an extent upon crown process, at any time before conveyance, binds the purchaser, although he has paid his money. If the purchaser die intestate and without an heir, before conveyance, it seems probable that the vendor might keep the estate and the purchase money, if paid. 134.

Up to the time for completion, the vendor is, in the absence

of special stipulation, entitled to the crops, or other ordinary profits of the land; but cannot take crops otherwise than in the due course of husbandry: after the time fixed for completion, and pending negotiation, the vendor may cut crops, &c., but the vendee will be entitled to the profits; 134, 130.

Where a purchaser has been let into possession, pending discussions as to title, if the contract go off through defects in title, he cannot be sued for use and occupation; nor can he, unless he agreed to quit on some specified event which has happened, be ejected without a demand of possession, 135.

Where the purchaser is a tenant from year to year, or for a longer term, the contract will not determine the tenancy, unless specially worded so as to be an absolute contract for purchase, whether the vendor do or do not shew a good title; but equity will restrain the landlord from enforcing payment of rent pending completion: a mere tenancy at will is determined by the contract, from the time at which possession is agreed to be given to the purchaser; 134, 135.

Q. 6.—What is an abstract of title, and how is it verified?

A.—An abstract of title is an instrument shewing the way in which the vendor derives his title to the land, and stating all deeds, wills, mortgages, judgments and documents of every kind by which such title is deduced, or by which the land is charged. And the purchaser has a right to require production of the documents of title, or if they cannot be produced, he is entitled to the best secondary evidence of them which can be given him: he may also require evidence of all facts material to the title, from the date at which its regular deduction commences, sufficient to establish affirmatively the vendor's title; see. chap. VIII, s. 6.

Q. 7.—Whose duty is it, in the absence of any stipulation on the subject, to prepare the conveyance?

A.—The purchaser is bound to prepare the conveyance, and tender it for execution to the vendor, 272.

Q. 8.—What covenants for title does a vendor, who is the absolute beneficial owner, give?

A.—A vendor, if the absolute beneficial owner, enters into the usual covenants that he has a good right to appoint and release, assign or surrender, (as the case may be, according as the estate is freehold, leasehold, or copyhold,) for quiet enjoyment, free from

encumbrances, and for further assurance, 286. *Church v. Brown*, 15 Ves. 263.

Q. 9.—In what cases are recitals evidence?

A.—If a deed be lost or destroyed, the recital of it is evidence of its existence as against all parties executing the deed containing the recital, and those claiming under them, but it is no evidence of its contents or effect beyond what its name and nature necessarily imply, unless proof be given of its loss or destruction, 171. The recital of a lease for a year in any conveyance executed before the 13th May, 1841, is sufficient evidence of the execution of such lease, without proof of its loss: and in any renewed ecclesiastical lease granted since the 21st of June, 1836, (unless in pursuance of a covenant or agreement entered into before the 1st March, 1836,) the recital of the old lease, and of the deaths, &c., of the *cestuis que vie*, is conclusive evidence thereof: 173. In the absence of better evidence, recitals in deeds and wills are admissible to prove births, marriages, and deaths, 197; but as against third parties such recitals in deeds are not evidence unless the deed was executed by some disinterested member of the family, 200.

Q. 10.—Is a stranger, not interested in the estate, liable to an action by the purchaser for misrepresentations made by him?

A.—A stranger who, even from mere wantonness, intending to deceive, although without any view to gain, makes a false representation to a purchaser as to the value or rent of the property, is liable to an action by the purchaser for such misrepresentation, 51. *Bardell v. Spinks*, 2 Car. & K. 646.

Q. 11.—Is a vendor in any and what cases, bound to disclose defects?

A.—He is not bound to disclose *patent* defects, or such as might be discovered by ordinary vigilance on the part of a purchaser; *e. g.*, the existence of an open footpath across the property, *Bowles v. Round*, 5 Ves. 508. As regards *latent* defects, or such as the greatest attention would not enable the purchaser to discover, (*e. g.*, the existence of defects in a ship's bottom when sold afloat,) if the vendor omit to disclose them, he cannot rely on the aid of a Court of Equity; but at law the rule seems to be otherwise, in the absence of fraud, if the sale be made with all faults, *Baglehole v. Walters*, 3 Camp. 154. The vendor must not, either during a treaty for, or while intending, a sale, endeavour to conceal a defect,

or to divert a purchaser's attention from it, 44, 45. *Shirley v. Stratton*, 1 Bro. C. C. 440.

Q. 12.—After the conveyance has been executed, can a purchaser, upon discovering a defect of title, in any case, obtain relief either at law or in equity otherwise than by action upon the covenants for title?

A.—A purchaser, after conveyance and payment of his purchase money, may obtain relief in equity against a vendor who has induced him to accept a defective title by fraudulent misrepresentation, or fraudulent concealment of a material fact which the purchaser had no means of discovering, 420. *Small v. Atwood*, You. 407; *Edwards v. McLeay*, G. Coop. 308, 312; *Early v. Garrett*, 4 Mann. & R. 687, 690. At law he may, after conveyance, bring an action on the case for a fraudulent misrepresentation of the property or the title; or he may recover the purchase money if the circumstances of the case entitle him to rescind the contract; 423. *Dobell v. Stevens*, 3 B. & C. 628.

Q. 13.—Will the Court of Chancery in any, and what cases, set aside a sale of lands for inadequacy of price only?

A.—If the vendor in fixing the price have altogether relied upon information furnished to him by the purchaser, and such information turn out to have been (even unintentionally) materially incorrect, the vendor will be entitled, even after conveyance, to have the contract set aside, 392. *Carpmael v. Powis*, 11 Jur. 158, 10 Beav. 36. A purchaser, after completion, could not in the absence of fraud obtain relief on the ground of the price being unreasonable, 422.

Q. 14.—Does it follow that because a court of equity refuses specifically to perform a contract, that it will rescind it?

A.—There are many cases where, though specific performance would be refused, equity will not rescind the contract, but will leave the parties to their remedies upon it at law; *Sugd. Vend. & Pur.* 269; *Mortlock v. Buller*, 10 Ves. 308.

Q. 15.—What must be shewn as to title to induce a court of equity to compel an unwilling purchaser to take it?

A.—A purchaser is entitled to a good title, and cannot be compelled to take one which is doubtful, 232; *Sugd. Vend. & Pur.* 505 et seq.; but he will be bound by his agreement if he have clear notice of the state of the title before entering into it; and he will

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also be bound to take a doubtful title if he has waived his right to a good title; 241.

Q. 16.—Is a conveyance upon a sale by an infant void or voidable only?

A.—Any deed executed by an infant, which takes effect by delivery, is voidable only, 2, note (a). *Anon. v. Hancock*, 17 Ves. 383. See *Zouch v. Parsons*, 3 Burr. 1794.

Q. 17.—If an infant vendor commit a fraud upon the purchaser by falsely representing himself as of age, will a court of equity give the purchaser any and what relief, if the vendor attempts to recover the land in ejectment?

A.—If the infant were to proceed at law to recover the land, equity would restrain the action, except upon the terms of his refunding the purchase money, 3. See *Eson v. Nicholas*, 1 D. G. & S. 118.

Q. 18.—What are the requisites to a confirmation by a *cestui que trust* of a voidable purchase of the trust estate by his trustee?

A.—To make his confirmation binding, the *cestui que trust* must be *sui juris*, fully aware of the material facts, of his right to impeach the transaction, and of the legal consequences of his confirming it; he must be under no undue influence, the confirmation must be a solemn and deliberate act, free from any pressure resulting from the original transaction; and, in the case of a plurality of *cestuis que trust*, it must, to be effectual, be the act of all, as a majority cannot bind the minority; 28, 29. *Campbell v. Walker*, 5 Ves. 682; *Chalmer v. Bradley*, 1 Jac. & W. 51; *Cann v. Cann*, 1 P. Wms. 727; *Cockerell v. Cholmeley*, 1 Russ. & M. 418; *Carpenter v. Heriot*, 1 Eden, 338; *Crowe v. Ballard*, 3 Bro. C. C. 117.

Q. 19.—What false statements by the vendor will avoid the contract?

A.—Any false statement by a vendor, of an independant fact, —(as that the property has been valued by a surveyor at a specified sum,)—will if relied on by the purchaser, avoid the contract; *Buxton v. Lister*, 3 Atk. 386; but mere expressions of praise or affirmations of value, are immaterial; *Fenton v. Browne*, 14 Ves. 144. 49, 50.

Q. 20.—What are the essential requisites to the validity of an agreement for the sale of lands?

By the Statute of Frauds, 29 Car. II, c. 3, s. 4, it is requisite to the validity of an agreement for the sale of lands that it should be in writing, signed by the party to be charged, or his agent thereunto lawfully authorised; 102.

Q. 21.—What is constructive notice? give a definition.

A.—Constructive notice has been defined to be “evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted.” See *Plumb v. Fluitt*, 2 Anstr. 438. It may, perhaps, more correctly be considered to consist in those circumstances under which the court concludes, either that the party, (personally, or through his agent,) has fraudulently abstained from acquiring actual notice, or has been guilty of such negligence in not availing himself of the means of acquiring it, as, if permitted, might be a cloak to fraud, and which, therefore, the common interests of society require should in its consequences be treated as equivalent to actual notice; 450, 451.

Q. 22.—How must a vendor relying on a waiver by the purchaser of his right to an investigation of the title, charge such waiver in his bill for specific performance?

A.—In charging such waiver, it is not sufficient to allege facts which, if proved, would be evidence of it; and, on the other hand, it is improper to introduce general charges or averments of waiver, unsupported by a statement of the particular facts: the party ought so to frame his case, that the court can fairly see what the case is which is to be relied on; 532. *Clive v. Beaumont*, DeGex & S. 397.

Q. 23.—What covenants for title has a purchaser a right to, from a vendor who has acquired the estate sold by inheritance?

A.—Formerly the Court of Chancery would not compel a vendor to enter into covenants extending back further than the acts of the last owner; but where such owner himself acquired the estate otherwise than by purchase for valuable consideration, the “universal and settled practice of conveyancers” is, to make the covenants extend to the acts of all prior owners up to and inclusive of the last purchaser for value; and the courts would probably at the present day be inclined to sanction such practice by decision; 287.

Q. 24.—What are the requisites of an agreement relating to real estate, which equity will specifically enforce?

A.—The agreement, except in certain cases (see answer to Q.

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2.) must be in writing, in pursuance of the Statute of Frauds, 29 Car. II., c. 3; it must be certain, fair in all its parts, for an adequate consideration, and capable of being performed; Story Equity Juris. § 751.

Q. 25.—Can a purchaser who has been let into possession pending a discussion as to the title, be sued for use and occupation if the contract go off through defect in the title? and give reasons for your answer.

A.—Such a purchaser cannot be sued for use and occupation, for he does not hold as a tenant, and the plaintiff cannot convert him into an occupier, liable to pay for his occupation, by his own wrongful act in not completing the sale, 135, 503; Winterbottom v. Ingham, 7 Q. B. 611.

Q. 26.—If no time be fixed for the completion of the purchase, is the purchaser liable to pay interest?

A.—If no time be fixed for completion, the purchaser is liable to pay interest upon his purchase money, (unless lying idle, with notice of the fact to the vendor,) from the date of the contract, if he be then in possession *ex parte* Manning, 2 P. Wms. 410; or if he be not then in possession, from the time of his taking possession; Fludyer v. Cocker, 12 Ves. 25; or from the time at which he might prudently have taken possession, namely, the time when a good title is shewn; 329.

Q. 27.—What are the requisites of a "perfect abstract" of title?

A.—It must shew a perfect title, that is, it must shew that the vendor is either himself competent to convey to, or can otherwise procure to be vested in, the purchaser, the legal and equitable estates free from incumbrances; 149; see Morley v. Cook, 2 Hare, 111.

Q. 28.—Is marriage any part performance of a parol agreement entered into previously, but in contemplation of it? Give your reasons for your answer.

A.—Marriage is not, for the purpose of specific performance, considered as a part performance of a parol contract, for which it forms the consideration: because there can be no part performance of an incomplete contract, 541. Taylor v. Beach, 1 Ves. sen. 298; Dundas v. Dutens, 1 Ves. jun. 199.

Q. 29.—Who are generally and relatively incompetent to purchase or sell respectively?

A.—Incapacities to purchase or sell are considered as being of two descriptions: 1st, general, or such as depend on some circumstances personal to the proposed vendor or purchaser, and affecting his general capacity to buy or sell any real estate; and 2ndly, relative, or such as depend on the relation in which he stands to the particular property proposed to be sold or bought, or to the party with whom he proposes to deal; 1.

As regards the first class:—Corporations, who, though they may purchase, cannot hold lands without a license to hold in mortmain, or power given by act of Parliament; a number of persons unincorporated,—as the parishoners of a parish,—cannot purchase, as individuals must purchase only in their private capacities and in their individual names; an alien may purchase lands, but cannot hold them, as upon office found, they belong to the Crown; an infant may purchase, but upon attaining full age, may abandon the contract; a purchase by a lunatic or idiot is voidable by the Crown after office found, or by his committee after inquisition, or by his representatives after his decease,—but he cannot avoid the purchase himself; a purchase by a married woman is voidable by her husband, or by herself after his death; traitors and felons may, before judgment, purchase land, but upon judgment, it will be subject to the rights of the lord of the fee, or of the Crown,—purchases by them after judgment are subject to the same rules as purchases by aliens; upon a purchase by a bankrupt or insolvent, the lands vest in his assignees; 8-15. An infant cannot, as a general rule, make a conveyance binding upon himself after attaining full age, or binding upon his heirs if he die under age, or without confirmation after attaining full age; sales by a lunatic or idiot are voidable by his committee or his heirs after his death; it has been held that an innocent conveyance by a lunatic is absolutely void; a married woman cannot in general, convey without her husband's concurrence; a conveyance by a traitor or felon is subject to the rights of the crown or of the lord of the fee; 2-6.

As regards the second description, persons incompetent to sell are; those who have no transferable title to the land proposed to be dealt with; and those who stand in a special relation towards the proposed purchaser which may enable them to exercise an

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undue influence, as the relations existing between guardian and ward, solicitor and client, trustee and *cestui que trust*, and the like ; and persons standing in such relations are equally incompetent as purchasers ; and it is a rule in equity that no person " who, by being employed or concerned in the affairs of another, has acquired a knowledge of his property," or who, in respect of the property to be sold, has a duty to perform which is inconsistent with the duty or interest of a purchaser, shall purchase such property ; 7, 8, 16.

Q. 30.—When is a purchaser entitled to compensation ?

A.—The purchaser is entitled to compensation when the estate sold turns out to be deficient in quantity, quality, or the extent of the vendor's interest therein ; 343, 345, 566, 647.

Q. 31.—Distinguish between dependent and independent stipulations in a contract of sale ; state their effect ; and illustrate by examples.

A.—Dependent stipulations are those which are precedent to the performance of the contract, and upon which such performance depends ; as a general rule, the mutual engagements of the parties will be considered dependent on each other, and either must, (unless discharged therefrom by the other,) perform his liabilities before he seeks to enforce his rights under the contract. Independent stipulations are those which are to be performed independently of the performance of the remaining parts of the contract. As an example of the former,—a purchaser cannot, in general, sue upon the agreement without tendering the conveyance, and the sum due in respect of the purchase money and interest ; as an example of an independent stipulation,—if a day be fixed for the payment of money before the day on which the thing which is the consideration for such payment is to be performed, an action may be brought for the money before performance. 504, 505.

Q. 32.—When will the execution of a contract partly varied by parol, be decreed ?

A.—A party suing on a written contract is, as a general rule, bound by its terms, and cannot, upon the ground of fraud, surprise or mistake, seek to vary, add to or explain its contents ; except, perhaps, where the fraud consists in a refusal to accede to a promised variation upon the faith of which the party plaintiff entered into a written agreement : or in the case of a fraudulent preparation

or alteration of the agreement so as to make it inconsistent with the real intentions of the parties, and the understanding of the plaintiff at the time he executed it : or where by mistake an agreement not expressing the real intention of the parties is entered into, and the mistake is admitted by the answer, or not being denied by the answer, is proved by unexceptionable evidence. A *subsequent* parol variation may be enforced where there has been such a part performance of the varied agreement as would support a decree in the case of an original independent agreement, or where the defendant by his answer admits the variation and does not insist upon the statute. 546, 547.

COOTE ON MORTGAGES.

Question 1.—What are Mortgages, and how are they created ?

Answer.—A mortgage may be defined to be a debt by specialty, secured by a pledge of lands of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him remain the actual owners until barred by judicial sentence, by legislative enactment, or their own laches. It is a security founded on the common law, and perfected by a judicious and wise application of the principles of redemption of the civil law. 1. Mortgages must be created by deed : but in some cases a mortgage may in equity be created by parol, as in the case of a deposit of title deeds as a security for a debt, 165.

Q. 2.—What is an equitable mortgage ? and how is it effected by the Statute of Frauds ?

A.—An equitable mortgage is where a debtor deposits his title deeds with his creditor as a security for the debt ; see Will. Real Pro. 359. The Statute of Frauds, 29 Car. 2, c. 3, s. 4, enacts that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or some other person thereunto lawfully authorized. Notwithstanding this statute, it is now decided, that if the title deeds of an estate are (without even verbal communication,) deposited by a debtor in the hands of his creditor

or of some third person on his behalf, such deposit is of itself evidence of an agreement executed for a mortgage of the estate; *Ex parte Wright*, 9 Ves. jun. 258. An equitable mortgage by deposit of title deeds will in some cases be recognized even in a court of law; see *Sumpter et al. v. Cooper*, 2. B. & Ad., 223. 165.

Q. 3.—What Statutes affect the law of mortgages in Upper Canada?

A.—By 14 & 15 V. c. 45, s. 1—U. C. Con. St. c. 87, s. 1, a mortgagee of freehold or leasehold may acquire the equity of redemption without merger of the mortgage debt; by s. 2, where a prior mortgage acquires the equity of redemption, a subsequent mortgagee cannot foreclose or sell without paying off the prior mortgage; by s. 4, the mode of proof of the state of the mortgage account in case of suit for foreclosure or redemption, is regulated; by s. 5, the executor or administrator of a deceased mortgagee is enabled to reconvey the lands and give a discharge of the debt, in certain cases. By 12 V. c. 73, ss. 1, 2—U. C. Con. St. c. 22, ss. 257, 268, the interest of a mortgagor is made liable to seizure and sale under execution; and by s. 3—Con. St. s. 259, a mortgagee may become a purchaser upon such sale. By 20 V. c. 3, s. 11—U. C. Con. St. c. 22, s. 260, the mortgagor's interest in chattels mortgaged is made liable to sale under execution. By 4 W. IV. c. 1, s. 36, and 16 V. c. 121, s. 1—U. C. Con. St. c. 88, ss. 21–23, 25, the limitations of suits respecting mortgages are regulated. By 8 V. c. 8, s. 11—U. C. Con. St. c. 80, s. 24, the nominee of the Crown or his assignee is enabled to mortgage the lands before issue of the patent. By 20 V. c. 3—U. C. Con. St. c. 45, mortgages of chattels are regulated. By 19 & 20 V. c. 50—Can. Con. St. c. 42, mortgages of vessels are regulated.

Q. 4.—Are any, and what trustees allowed by any, and what, statutes in Upper Canada, to execute mortgages of the trust property, and upon what conditions, and for what purposes?

A.—Trustees of religious institutions are allowed by stat. 13 & 14 V. c. 78.—U. C. Con. St. c. 69, to create mortgages of the trust property, upon the terms and conditions usually agreed upon, for the purpose of building, repairing, extending or improving of such religious institutions or for the purchase of land on which the same may be erected; or may borrow money to pay the debt or part thereof and secure the repayment thereof by a like mortgage.

Q. 5.—What are the comparative advantages of Mortgages in fee, and mortgages for a term of years?

A.—Mortgages for a term of years have this advantage over mortgages in fee, that the security and debt devolve together, whereas in the case of a mortgage in fee the land descends to the heir and the debt to the executor, 109.

Q. 6.—What is meant by the rule “once a mortgage always a mortgage?”

A.—Courts of equity, looking always at the intent, and not at the form of things, disregarded all the defences by which the creditor surrounded himself, and laid down as plain undeviating rules, (Newcomb v. Bonham, 2 Vent. 364 ; 1 Vern. 7, 214, 233,) that it was inequitable the creditor should obtain a collateral or additional advantage through the necessities of his debtor, beyond the payment of principal, interest, and costs; and they established as principles not to be departed from, that “once a mortgage always a mortgage;” that an estate could not at one time be a mortgage and at another time cease to be so, by one and the same deed; and that a mortgage could not be made irredeemable. 11.

Q. 7.—Distinguish between “*vivum vadium*” and “*mortuum vadium*.”

A.—The common law recognized two kinds of landed security; the one, *vivum vadium*, consisted of a feoffment to the creditor and his heirs, until out of the rents and profits he had satisfied himself his debt; the creditor took actual possession of the estate and received the rents, and applied them from time to time in liquidation of the debt: the other, *mortuum vadium*, or mortgage ultimately known at the common law, was an absolute fee, with the condition annexed, making void the feoffment on payment of a given sum, which the common law allowed, if reserved to the feoffor or his heirs. The difference between these estates was striking: in the latter instance the feoffee took the whole estate, subject to be defeated, but which on the non-fulfilment of a certain engagement, became his own by an indefeasible title; in the former case the creditor took an estate, which, as soon as his debt was satisfied, *ipso facto* ceased, and the feoffor might re-enter and maintain ejectment; in the latter the determination was collateral to the estate; in the former, the defeasibility was an inherent quality of the estate. 4.

Q. 8.—Who are incapable of mortgaging?

A.—The exceptions which occur as to those who are capable of mortgaging are married women, infants, and lunatics, 103–107.

Q. 9.—Explain the effect of a power of sale contained in the mortgage deed.

A.—A power of sale in a mortgage deed prevents the necessity of a suit in Chancery, and provides a more simple and less expensive mode of barring the mortgagor's equity of redemption, in case default should be made in payment, and when such power is exercised, the mortgagee having the whole estate in fee-simple at law, is able to convey the same estate to the purchaser, and that without the consent of the mortgagor; 124–127; see Will. Real Pro. 356; see also *Corder v. Morgan*, 18 Ves. jun. 344.

Q. 10.—What is the effect of a purchase of the equity of redemption by the mortgagee?

A.—If the mortgagee in his lifetime obtain a release of the equity of redemption, and enter into possession, it is manifest that the debt and land have altered their characters, for the land has ceased to be a pledge, and the debt has become merged into the land; and, consequently, if from any circumstance after the death of the mortgagee, the release shall be set aside, the heir and not the executor will be entitled to the money; inasmuch as the mortgagee has done all in his power to make it real estate; 510.

But by Statute 14 & 15 V. c. 45, s. 1—U. C. Con. St. c. 87, s. 1, any mortgagee may take and receive from the mortgagor or his assignee a release of the equity of redemption, without thereby merging the mortgage debt as against any subsequent mortgagee having a charge on the same property. By s. 2 if any prior mortgagee takes a release of the equity of redemption of the mortgagor or his assignee, or purchases the same under any power of sale in his mortgage, or any judgment or decree, no subsequent mortgagee shall be entitled to foreclosure or sell such property without redeeming or selling subject to the rights of such prior mortgagee in the same manner as if such prior mortgagee had not acquired such equity of redemption.

Q. 11.—Wherein consists the utility of the mortgage bond?

A.—It creates a personal liability on the part of the mortgagor, and so gives the mortgagee additional collateral security for his debt, 12.

Q. 12.—What is the meaning of foreclosing a mortgage, and what is the effect of the foreclosure?

A.—Foreclosing a mortgage means the barring of the mortgagor's equity of redemption in the mortgaged premises through means of a court of equity, and thereby giving the mortgagee the same title to the property which the mortgagor held prior to the mortgage, 492 *et seq.*

Q. 13.—What are the comparative advantages to the mortgagee of a decree for sale and a decree for foreclosure?

A.—Where the land is not of sufficient value to pay the debt, a sale has this advantage over foreclosure, that the mortgagee may recover the balance on his collateral securities; in the case of a foreclosure, if he were to take proceedings subsequently on his collateral securities, the foreclosure would be thereby opened; 493 *et seq.*

Q. 14.—Is parol evidence admissible to shew that an absolute conveyance was intended for a mortgage merely?

A.—Equity will admit parol evidence to shew that an absolute conveyance was intended by way of security only: a case decided by Lord Nottingham is one of frequent reference—*Sir G. Maxwell v. Lady Montacute*, Prec. Chanc. 526; in this case a man agreed to lend money on mortgage, and it was proposed, as was formerly practiced, that the mortgagor should execute an absolute conveyance, and that there should at the same time be a deed of defeasance from the mortgagee; the mortgagor executed the conveyance, and then the mortgagee refused to execute the defeasance; Lord Nottingham, (after the Statute of Frauds,) admitted parol evidence to shew the agreement, and decreed against the mortgagee. 12, 13. See *Walker v. Walker*, 2 Atk. 99.

Q. 15.—What liabilities does the mortgagee assume by taking possession of the mortgaged property?

A.—If the mortgagee be in possession he is considered in equity in some measure, in the light of a trustee, and is so held accountable for the profits, 808.

Q. 16.—What are the respective relative situations of mortgagor and mortgagee before redemption or foreclosure?

A.—On the execution of the mortgage the mortgagor becomes the equitable owner, the mortgagee the legal owner of the land;

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in which respective situations they remain until the land is redeemed or foreclosed; 819.

Q. 17.—Why is it desirable that a mortgagor should join in an assignment of mortgage?

A.—If the mortgagor do not concur in the assignment he is not bound by the amount appearing due on the face of the mortgage; and consequently the concurrence of the mortgagor should if possible, never be dispensed with, 302. *Matthews v. Wallwyn*, 4 Ves. jun. 118.

Q. 18.—In case of the decease of the mortgagor intestate, and without heirs, does the equity of redemption escheat?

A.—Whether an equity of redemption is subject to escheat does not seem to have been precisely determined; but the reasoning of the Lord Keeper in *Burgess v. Wheate*, 1 Bl. Rep. 123, as well on the principles on which he determined that a mere trust estate was not so subject, fairly leads to a conclusion that an equity of redemption is not liable to escheat, for, as remarked by the Lord Keeper, it is a question of tenure and not of forfeiture, and the right to escheat arises *pro defectu tenentis*; so long as the lord has his tenant to perform his services, the land cannot revert in demesne, and the crown has no equity on which to sue a *subpoena*; 34.

Q. 19.—Is an equity of redemption of a mortgage in fee, or of a mortgage of a term of years, liable to forfeiture for treason or felony?

A.—An equity of redemption of a mortgage in fee is liable to forfeiture for treason, but not for felony; see *Attorney General v. Sands*, Hard. 488; but the equity of redemption in the case of a term of years is forfeited by either treason or felony; 35. See Sugd. *Gilb. on Uses*, 79.

Q. 20.—Will the Court of Chancery in any, and what cases, in taking an account against a mortgagee in possession, take it with annual rests?

A.—In taking an account against a mortgagee, the court will, it seems, direct annual rests, if there be no interest in arrear when the mortgagee takes possession; *Sheppard v. Elliott*, 4 Madd. 254; and in certain cases in which the rents considerably exceed the interest; *Gould v. Tancred*, 2 Atk. 538; so if he has set up an unfounded claim to the equity of redemption; *Mongomery v. Calland* 14 Sim. 79; so where a mortgagee in possession comes to a settle-

ment of accounts, by which it appears that no interest is then due, or the interest then due is converted into principal, and the mortgagee afterwards continues in possession; *Wilson v. Clure*, 3 Beav. 236. 530, 531.

Q. 21.—When can the assignee of a *chose in action* sue for a debt in equity? and how does such assignee take?

A.—When the assignor refuses to allow the assignee to use his name, or does or intends some act to prevent him from recovering at law, such assignee can sue in equity. The assignee of a *chose in action* duly assignable in equity, takes subject to the existing equities against the assignor. 234. See *Hammond v. Messenger*. 9 Sim. 327, and *Ord. v. White*, 3 Beav. 357.

Q. 22.—Under what circumstances is a mortgagee entitled to a receiver?

A.—The mortgagee may stipulate with the mortgagor for the appointment of a receiver, to be paid by the latter, *Chambers v. Goldwin*, 9 Ves. jun. 271; he may also if the property lies dispersed, or at a distance, or is so circumstanced that the mortgagee must, if the property had been his own, have appointed a bailiff or receiver to manage it and collect the rents, without the authority of the mortgagor. 343. *Bonithon v. Hockmore*, 1 Vern. 816.

Q. 23.—From what dates does the Statute of Limitations run against a mortgagee out of possession?

A.—The Statute of Limitations commences to run from the time when the right to recover accrues to the mortgagee, or from the payment of any part of the principal or interest on the mortgage, or from the giving of some acknowledgement in writing of his right, signed by the mortgagor, 449. When the mortgage deed contains merely a proviso that the mortgagee may enter into possession on default in payment, but no express or implied covenant that the mortgagor shall in the meantime remain in possession, the Statute of Limitations runs from the execution of the mortgage deed, if no subsequent payment is made of principal or interest, 450; *Doe v. Lightfoot*, 8 M. & W. 553. See 4 W. IV., c. 1, ss. 36, 43; 16 V. c. 121, s. 1—U. C. Con. St. c. 88.

Q. 24.—In what relation does the lessee of the mortgagor stand with respect to the mortgagee?

A.—The mortgagor being himself tenant at will or at sufferance to the mortgagee, cannot make a lease to bind the latter; if he

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make such lease, the mortgagee may proceed to eject the lessee without notice; if the land, however, at the time of the mortgage, be in the occupation of a tenant from year to year, he will be entitled to the usual notice to quit. *Birch. v. Wright*, 1 T. R. 383. 332.

Q. 25.—How are the priorities of several mortgagees of the same mortgagor ascertained?

A.—Each mortgagee shall have preference according to his priority in time, the maxim of equity being *qui potior est in tempora potior est in jure*, 209.

Note.—By stat. 9 V. c. 34, s. 6—U. C. Con. St. c. 89, s. 44, the priorities of the several mortgagees of the same mortgagor are regulated according to the time of registration of their several mortgages.

Q. 26.—Blackacre and Whiteacre are by separate deeds, at different dates, and for distinct debts, mortgaged to A.; subsequently the same mortgagor mortgages Blackacre alone to B.; can B. redeem the mortgage on Blackacre without also redeeming that on Whiteacre?

A.—Where two or more distinct mortgages are made of different estates between the same parties, and a subsequent mortgage is given by the same mortgagor to a third party of one of the estates, although without notice, such third party shall not be permitted to redeem one mortgage without redeeming both. 399, 400. See *Cator v. Charlton*, cited in *Jones v. Smith*, 2 Ves. jun. 376.

Q. 27.—If leasehold are mortgaged and before the mortgagee is paid off the term expires, and the mortgagee then takes a new lease in his own name, what are his rights in respect of such new lease?

A.—It has been decided that if the mortgagee of a leasehold estate obtain a renewal of the lease, although there existed only a tenant right, the renewed lease will be held subject to the like equity as subsisted in the old lease, and will be redeemable accordingly. Such mortgagee will be entitled to his costs in effecting the renewal, with interest. 122. See *Holt v. Holt*, 1 Ch. Ca. 190, and *Lacon v. Mertons*, 3 Atk. 4, 2 Vern. 84.

Q. 28.—If a surety for a mortgagor purchase the mortgage for a less sum than the mortgage debt, what are his rights against the mortgagor?

A.—A surety who pays off the debt of the principal debtor, is entitled to the benefit of every security which the creditor has existing against the latter; per Lord Eldon in *Mayhew v. Cricket*, 2 Swanst. 191; but if the surety compounds the debt on payment of a smaller sum, he cannot as against the principal, become a creditor for the full amount; see *Reed v. Norris*, 1 M. & C. 361: he will be allowed interest on the amount paid by him for the mortgagor. 481, 482.

Q. 29.—Will a mortgage given by a client to his solicitor for costs due and to become due, be to any and what extent a valid security?

A.—A mortgage by a client to a solicitor for costs due and to become due will be restricted to those actually due, 369; *Williams v. Piggott*, Jacob. 598.

Q. 30.—Is a mortgagee who assigns the mortgage in any case liable to the mortgagor for rents and profits received after the assignment by his assignee? Give your reasons.

A.—If the mortgagee be in possession, he is considered in equity, in some measure in the light of a trustee, and accountable for the profits; and, therefore, if without the assent of the mortgagor, he assigns over the mortgage to another, he will be held liable to account for the profits received subsequent to the assignment; see 1. Eq. Ca. Ab. 328; on the principle that having turned the mortgagor out of possession, it is incumbent on him to take care in whose hands he places the estate; 303.

Q. 31.—Can the mortgagee compel the mortgagor to account for rents and profits received by the latter while in possession?

A.—The mortgagee cannot compel the mortgagor to account for the rents and profits received by him while in possession, even although the security shall prove insufficient, 325, 530. *Colman v. The Duke of St. Albans*, 3 Ves. jun. 25.

Q. 32.—Distinguish between "legal" and "equitable" mortgages.

A.—A legal mortgage cannot be created except by deed; an equitable mortgage may be created by parol; 165.

Q. 33.—What are the rights and remedies of a mortgagee against a tenant in possession of the mortgagor after default?

A.—The mortgagee may annul the lease, or he may confirm the tenancy, or rather establish a new tenancy upon the same terms:

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see *Keech v. Hall*, Dougl. 22; and any act of the mortgagee, demonstrating an approbation of the demise, such as the receipt of or distress for rent or the like, will be evidence of a tenancy; 334.

Q. 34.—If it is desired that the mortgagor should pay a greater amount of interest in the event of the interest not being punctually paid, is there any, and if so what, means of effecting such intention?

A.—This may be done by means of an agreement by the mortgagor to pay a certain rate of interest, and a stipulation that on punctual payment the interest shall abate, and a less amount be payable, upon which the greater amount may be exacted in the event of default in payment at the proper time, 440; *Jory v. Cox*, Pre. Ch. 160.

Q. 35.—What is the position of a lessee under a lease from a mortgagor made after the mortgage, as regards the mortgagee?

A.—Although in equity the mortgagor remains the actual owner of the land until foreclosure, entitling him while in possession to receipt of the rents and profits without account, yet equity regarding the land with all its produce as a security for the mortgage debt, will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee: on this principle the mortgagor, generally speaking, being only tenant at will or at sufferance, cannot make a lease to bind the mortgagee, and if he make such a lease the lessee will be liable to eviction in the same manner as the mortgagor, 332; see *Keech v. Hall*, Dougl. 22; also *Doe v. Maisey*, 8 B. & C. 767.

Q. 36.—If two persons advance money on a mortgage, and one die, to whom will the debt belong?

A.—The debt at law will belong to the survivor, but in equity there will be a tenancy in common; see *Petty v. Styward*, 1 Coll. Rep. 31. On paying off the mortgage, the concurrence of the personal representatives of the deceased mortgagee is necessary, to give a valid discharge to the mortgagor. 511.

JARMAN ON WILLS.

Question 1.—What is a will ?

Answer.—A will is a declaration of a man's mind as to the manner in which he would have his property or estate disposed of after his death : when it operates upon the personal property, it is sometimes called a testament, and when upon real estate, a devise ; but the more general and popular denomination of the instrument, embracing equally real and personal estate, is that of last will and testament. i. 1.

Q. 2.—What is a nuncupative will ?

A.—A nuncupative will is where the testator makes a declaration of his intention in his last hours before a sufficient number of witnesses, and which is afterwards reduced to writing ; see Tomlin's *L. Dic. tit. Wills*.

Q. 3.—What are the formal parts of a will ?

A.—The formal parts of an ordinary will are : 1. the inducement, containing the name of the testator and a statement of his residence and quality ; 2. the devises and bequests ; 3. the appointment of executors ; 4. a revocation of prior wills ; 5. the testimonium clause ; 6. the signature ; and 7. the attestation.

Q. 4.—What is a republication of a will ?

A.—Republication is of two kinds, express and constructive : express republication occurs where a testator repeats those ceremonies which are essential to constitute a valid execution, with the avowed design of re-publishing the will ; constructive republication takes place where a testator for some other purpose, makes a codicil to his will, in which case the effect of the codicil, if not neutralized by internal evidence of a contrary intention, is to republish the will ; i. 174.

Q. 5.—When can a married woman make a will ?

A.—A married woman cannot make a will of either personal or real estate ; except under settlement or marriage contract, or by her husband's license, i. 30. By St. 22 V. c. 34, s. 16—U. C. Con. Stat. c. 73, s. 16, it is enacted that from and after 4th May, 1859, every married woman may by devise or bequest executed in the presence of two or more witnesses, neither of whom is her hus-

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band, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property be acquired before or after marriage, to or among her child or children, issue of any marriage, and failing there be any issue, then to her husband, or as she may see fit, in the same manner as if she were sole and unmarried; but her husband shall not be deprived by such devise or bequest of any right he may have acquired as tenant by the courtesy.

Q. 6.—Is there any difference between the effect of a gift to a witness in a will of freehold and personalty?

A.—A gift to a witness in a will of freehold is, so far as relates to the witness and those claiming under him, made absolutely null and void by Stat. Geo. II., c. 6; but this act did not extend to wills of personal estate, for as such wills did not require an attestation at all, there was no ground for invalidating the witness: but the distinction is done away with by Imp. Stat. 1 V. c. 26, which places wills of realty and wills of personalty on the same footing; i. 65—67.

Q. 7.—From what period does a will speak as to realty and as to personalty; and is there any, and what Provincial Statute which affects, and how, that period?

A.—As regards realty a will speaks from the time of its execution, and is looked upon as a present conveyance to take effect at a future time, namely on the death of the testator; see Will. R. Pro. 173: as regards personalty it is for some purposes considered to speak from the date and for others from the death of the testator, and was held to pass such personalty as he might happen to possess at the time of his death; i. 277—287. Such is the law as regards wills made before the year 1838; but wills which are made or republished since that time are regulated by Imp. Stat. 1 V. c. 26, s. 24, which provides, that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless the contrary intention shall appear by the will. i. 387.

By Prov. Stat. 4 W. IV., c. 1, s. 49—U. C. Con. St. c. 82, s. 11, it is enacted that when the will of any person dying after 6th March, 1834, contains a devise in any form of words of all such real estate as the testator shall die seised or possessed of, or any

part or proportion thereof, such will shall be valid and effectual to pass any land acquired by him after the making of the will.

Q. 8.—In what ways may a revocation of a will in whole or in part be effected?

A.—The revocation of a will of lands must, by the Statute of Frauds, 29, Car. II., c. 3, s. 6, be effected by some other will or codicil in writing, or other writing declaring the same, signed by the testator in the presence of three or more witnesses: the revocation of a will of personalty must be committed to writing, and then read to the testator, and allowed by him, and proved to be so done by three witnesses at the least; i. 152, 153. By Imp. Stat. 1, V. c. 26, s. 18, a will (except when made in the exercise of a power of appointment in certain cases) is revoked by marriage; i. 114. A will may also be revoked by the "burning, tearing, or otherwise destroying" of it by the testator or some person in his presence, and by his direction, with the intention of revoking the same, i. 128. A subsequent alteration of estate in the property devised will effect a revocation as to the devise of such property, where it is substantially alienated and withdrawn from the operation of the will by being vested in another, i. 147. Formerly also, a will might have been revoked by an attempted disposition of the property, but this cannot now take place, i. 150, 152.

Q. 9.—How far and in what respects do the statutes commonly called the statutes of Mortmain, or the principal of law analagous thereto, affect the disposition of property by will?

A.—The disposition of property by will for superstitious uses or for charitable purposes is not allowed, i. 188 *et seq.*

Q. 10.—What personal restraints are there on testamentary disposition?

A.—By the Statute of Wills, 34 & 35, H. VIII., c. 5, s. 14, infants under the age of twenty-one years are restrained from making wills of realty, and by Imp. Stat. 1 V., c. 26, they are restrained from making wills of personalty, i. 29. A married woman in general cannot make a will [but see Prov. Stat. 22 V. c. 34, s. 16—U. C. Con. St. c. 73, s. 16.] Persons deaf, dumb, and blind, persons attainted, idiots, lunatics and persons of unsound mind, or under the influence of drink, are incapable of making wills; i. 50, *et seq.* A devise of realty by an alien is at least voidable, but alien friends may make wills of personalty, i. 50.

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Q. 11.—In what cases is parol evidence admissible in regard to wills, for explanation or otherwise?

A.—Parol evidence is admissible to explain a latent ambiguity in a will, i. 371 *et seq.* Where the testator uses a foreign language or terms or characters not understood by the court, they may be explained by verbal evidence, i. 363.

Q. 12.—Give some instances of estates arising by implication under will, and explain the principles on which such implication rests.

A.—The following are some instances of estates arising by way of implication under a will: a devise to a testator's heirs after the death of A., will confer on A. an estate for life by implication; but under a devise to B., a stranger, after the death of A., no estate will arise to A. by implication, upon the principle that there must be an intention to disinherit the heir to raise an estate by implication. Year Book, 13 Hen. VII., fol. 17. If a testator, whose issue was an only daughter, devised real estate to such daughter after the death of his wife, and it happened that he afterwards had a son born, who survived him, the conclusion arrived at was, that the wife would take an implied estate for life, though the ulterior devisee was not in event the testator's heir; upon the principle that the implication occurs wherever the express devise is to the person who is the testator's heir apparent or presumptive at the date of the will, and not otherwise. Where a testator devises to one of two daughters, (his co-heiresses) after the death of his wife, she (the wife) takes an estate for life by implication: for an implication arises in the case of a devise as well to one of several co-heirs, as to a sole heir. i. 465-468.

Q. 13.—A devise of lands is made to A. for life, and after his death to B. in fee, what estate do they severally take; and when does it vest?

A.—Under such a devise, A. takes an estate for life, and B. takes an estate in fee simple in remainder, ii. 184. The respective estates of A. and B. are both vested at the instant of the death of the testator; the only difference between the devisees being, that the estate of the one is in possession, and that of the other is in remainder, i. 727.

Q. 14.—Explain the doctrine of lapse.

A.—The liability of a testamentary gift to failure or lapse by

reason of the decrease of its object in the testator's lifetime is a necessary consequence of the ambulatory nature of wills ; which not taking effect till the death of the testator, can communicate no benefit to persons who previously die ; in like manner as a deed cannot operate in favor of those who are dead at the time of its execution, i. 293.

Q. 15.—What are the consequences of the distinction between conditions “precedent” and “subsequent?”

A.—Conditions precedent and subsequent differ considerably in regard to the consequence of events rendering the performance of them impracticable : where a condition precedent becomes impossible to be performed, even though there be no default or laches on the part of the devisee himself, the consequence is, the devise fails ; on the other hand if the performance of a condition subsequent be rendered impossible, the estate to which it is annexed becomes by that event absolute, i. 805, 806.

Q. 16.—Define the legal doctrine of election, and give an example.

A.—The doctrine of election may be thus defined : he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it ; for example, if a testator has affected to dispose of property which is not his own and has given a benefit to a person to whom that property belongs, the devisee or legatee accepting the benefit so given to him, must make good the testator's attempted disposition, but if on the contrary, he chooses to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights ; i. 385.

Q. 17.—Under a devise of lands to A. and his children, A. having no children either at the date of the will, or at the testator's death, what estate does A. take ?

A.—Under such a devise A. takes an estate tail, for “the intent of the deviser is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder, they cannot take, for that was not his intent, for the gift is immediate ; therefore such words shall be taken as words of limitation ;” ii. 307, 308. Wild's

case, 6 Co. 17; *Davie v. Stephens*, Doug. 321; *Seale v. Barter*, 2 Bos. & Pull. 485.

Q. 18.—What is the rule by which to determine whether or not a devise to a person in trust for another, gives the legal estate to the person named as trustee?

A.—The courts generally give such a construction as will confer on the trustee an estate co-extensive with those interests which are limited in the terms of trust estates, if the other parts of the will can by any means be made consistent, ii. 199.

Q. 19.—In what cases are cross-remainders implied in a will?

A.—Cross-remainders are implied in a will in the following cases: 1st, Upon a devise to several persons in tail being tenants in common, with a limitation over for want or in default of issue, cross-remainders are to be implied among the devisees in tail; 2, The word "remainder," following a devise to several in tail, will raise cross-remainders among them; 3, a devise to the children of A. for life, and for want and in default of such issue, then over, creates cross-remainders by implication for life among such devisees. ii. 479. The principle has been long admitted, that wherever real estate is devised to several persons in tail as tenants in common, and it appears to be the testator's intention, that not any part is to go over until the failure of the issue of all the tenants in common, they take cross-remainders among themselves, ii. 458.

Q. 20.—Is there any difference between the construction of wills and deeds as to the implication of cross-remainders?

A.—The difference between the construction of wills and deeds as to the implication of cross-remainders is: that in the former cross-remainders need not be limited expressly, but may be implied from the context, ii. 457; whilst in the latter they cannot arise without express words. See *Watk. Conv.* 199.

Q. 21.—Explain the doctrine of constructive conversion.

A.—The doctrine of constructive conversion is:—equity considers that as done which ought to have been done, and it is well established that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted: it follows therefore that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed

upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this character; i. 524.

Q. 22.—What are the requisites of the attestation of a will in Upper Canada?

A.—The will must be attested by two or more witnesses; and such witnesses must subscribe their names in the presence of each other. 4. W. 4, c. 1, s. 51.—U. C. Con. St. c. 82, s. 13.

Q. 23.—In regard to a devise of real estate, what is the rule respecting conditions in restraint of marriage?

A.—It seems to be generally admitted, (though the point rests rather on principle than decision,) that unqualified restrictions on marriages are void, on grounds of public policy, i. 836 *et seq.*

Q. 24.—In administering assets of a testator what is the general order of the application of the several funds liable to the payment of his debts?

A.—The following is the general order: 1, The general personal estate not expressly or by implication excepted: 2, Lands expressly devised to pay debts, whether the inheritance, or a term carved out of it, be so limited: 3, Estates which descend to the heir, whether acquired before or after the making of the will: 4, Devise or bequeathed property, real or personal, which is charged with debts, and then specifically disposed of, subject to such charge: 5, General pecuniary legacies *pro rata*: 6, Specific legacies *pro rata*: 7, Real estate devised, and if the rule be subject to the old law, whether in terms general or specific; ii. 546, 547.

Q. 25.—Where a testator contracts to sell the devised estate, and dies without having executed a conveyance to the purchaser, what interest does the devisee take; and to whom does the purchase money go?

A.—In such case the devise remains as to the legal estate, and no further, this being all the interest which the testator has power to dispose of at his decease; and the conversion as between the real and personal representatives, being completely effected by the contract, (supposing it to be a binding one), the devisee, it is conceived, takes only the legal estate: as to the purchase money, it constitutes part of the testator's personal estate, consequently it goes to his personal representatives; i. 147-148. See *Knollys v. Shepherd* 1 J. & W. 499.

Q. 26.—When will lands held in trust pass under a general devise of all the testator's lands?

A.—In the case of *Lord Braybrooke v. Inskip*, 8 Ves. 435, Lord Eldon held the rule to be, that trust estates would pass under a general devise, unless it could be collected, from expressions in the will, or purposes or objects of the testator, that he did not mean that they should pass, i. 641.

Q. 27.—What may be devised or bequeathed?

A.—The power of testamentary disposition extends to all interests in real and personal estate, which, at the decease of the testator, would if not so disposed of, devolve to his general real or personal representatives, whether the testator be the legal or the beneficial owner only, or unite in himself both these characters; i. 30.

Q. 28.—Is a devise or bequest by a joint tenant valid?

A.—A devise or bequest by a joint tenant of real or personal estate is void, in the event of the testator dying in the lifetime of his co-proprietor, whose title by survivorship takes precedence of the claim of the devisee or legatee, as it would of that of the heir or administrator of the pre-deceased joint tenant, in case he had died intestate: but if the testator survives his companion in the tenancy, the efficacy of the devise or bequest formerly depended on the nature of the property, if it were a freehold interest, the estate subsequently devolving by survivorship did not pass—the testator not having a sole or devisable estate when he made his will; and, by parity of reasoning, any divided part or share which, after the execution of the will, he might have acquired on a partition of the property which would not pass thereby; but this reasoning it is obvious did not apply to leasehold property or personal estate; a future interest in which devolving by survivorship or acquired by partition, would, like all other after acquired personalty, pass by a general or residuary bequest; and such is now the rule with respect to real estate devised by wills made since the year 1837; and now it is unnecessary to inquire whether the devising joint tenant had become solely seized by survivorship at the period of its execution; it is enough that he had acquired a devisable interest in the estate at the time of his decease; i. 38, 39.

Q. 29.—Does a will in all cases speak only from the decease of the testator?

A.—Since the passing of the recent [imperial] act, it is doubtful

whether a will may speak from its date, but it seems probable that it may do so in some cases of specific bequests, or as to bequests in words pointing at the present time, i. 290, 291; as regards the objects of gift, the will speaks, as regards realty from the time of execution, and as regards personalty from the death of the testator, as the act only affects the subject matter of disposition, l. 291, 277, *et seq.*

Q. 30.—Is a will of realty executed abroad under a power, governed by the *lex domicilii* or the *lex loci rei sitæ*?

A.—A will of fixed or immovable property is generally governed by the *lex loci rei sitæ*: that is the law of the place where such property is locally situated is to govern as to the capacity or incapacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities to give the will its due attestation and effect; and hence the place where a will of immovable property happens to be made, and the language in which it is written, are wholly unimportant, as affecting both its construction and the ceremonial of its execution, the locality of the devised property is alone to be considered; i. 1.

Q. 31.—How far does "domicile" affect a testamentary disposition?

A.—A testamentary disposition of immovable property is governed by the *lex loci rei sitæ*, that is, the law of the place where the property is situated; and a testamentary disposition of personal, or rather movable property, is governed by the *lex domicilii*, that is the law of the country where the testator is domiciled; i. 1, 2.

Q. 32.—What are the statutory provisions affecting wills in Upper Canada?

A.—Statute 22 V., c. 93,—U. C. Con. Stat. c. 16, provides that probate of wills and letters of administration shall belong to the Surrogate Court of Upper Canada, and the practices of said court shall be the same as the Court of Probate in England, unless otherwise provided by said Act, 22 V., or by the rules or orders made under the Surrogate Court Act, 1858; this act also provides that nuncupative wills are good only in certain cases as therein provided. Stat. 9 V., c. 34, s. 12,—U. C. Con. Stat. c. 89, s. 46, provides for the registration of wills, within the space of twelve months next after the death of the deviser, testator, or testatrix; unless the person interested in any such will be disabled from

recording the same within that time by reason of the contesting of such will, or any other inevitable difficulty without his neglect or default, and in such case registry can be effected within twelve months after the removal of the impediment. By 12 V., c. 64, s. 10,—U. C. Con. St. c. 12, s. 28, it is provided, that the Court of Chancery shall have the power to try the validity of wills and to pronounce such wills to be void for fraud and undue influence or otherwise, in the same manner and to the same effect as that court has power to try the validity of deeds and other instruments. By 4 W. 4, c. 1, ss. 49, 50, 51,—U. C. Con. St. c. 82, ss. 11, 12, 13, it is provided that estates acquired after the making of a will, may pass by the will where such intention is expressed; that a devise of land shall carry as large an estate as the testator had in the land, unless a contrary intention be expressed: and that statute further enacts that wills shall be attested by two or more witnesses, who must sign in the presence of each other, but not necessarily in the presence of the testator.

Q. 33.—What is the rule of construction of the word "heir" in a gift to him of both real and personal estate?

A.—Where real estate is demised simply to the heir, he takes the property in the character of devisee, and not as formerly, by descent; and such a devise vests in the heir an estate in fee simple, without words of limitation, or any expression equivalent thereto, ii. 2; and (according to the principle laid down by Lord Eldon in *Wight v. Atkyns*, Coop. 111) whenever real estate is combined with personalty in the gift, both species of property receive the same construction, as if the whole property which was the subject of the disposition, were real estate, ii. 22.

Q. 34.—When may "survivor" be construed "other"?

A.—The word "survivor" may be construed "other" when such a construction is warranted by the intention of the testator apparent from the wording of the will; in other cases it is now settled (though formerly doubted), that the word must be interpreted according to its strict literal meaning; ii. 609 *et seq.*

Q. 35.—When a bequest is made to A. with a gift in case of his death, what is the effect of it?

A.—If A. survives the testator, he takes absolutely, ii. 659.

Q. 36.—What is the effect of a gift over, in default of issue, with respect to personal and real estate respectively?

A.—A gift of personalty, to arise on a general failure of issue, is void for remoteness. Such a devise of real estate has the effect of creating in the prior devisee an estate tail, and the limitation is a remainder expectant on that estate. ii. 428.

RUSSELL ON CRIMES.

Question 1.—Is there any and what age when by presumption of law an infant cannot be guilty of a capital offence?

Answer.—With regard to capital crimes the law is minute and circumspect, distinguishing with great nicety the several degrees of age and discretion, though the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment; but within the age of *seven years* an infant cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for *ex-presumptione juris* such an infant cannot have discretion; and against this presumption no averment shall be admitted; i. 2.

Q. 2.—At what age are infants deemed to be *doli capaces*?

A.—On the attainment of *fourteen years* of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes them at those years to be *doli capaces*, and able to discern between good and evil, and therefore subjects them to capital punishment as much as if they were of full age; i. 2.

Q. 3.—What is the rule or presumption of law between those ages?

A.—During the interval between fourteen years and seven, an infant shall be *prima facie* deemed to be *doli incapax*, and presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the particular facts and circumstances of the case, i. 2.

Q. 4.—Is there any and what statute applying to the phrase "against the form of the statute or statutes" in indictments?—and what would the effect be of omitting all such reference to the statute in statutory offences?

A.—The Imp. stat. 7 Geo. 4, c. 64, s. 20, professing to have for its object that the punishment of offenders may be less frequently interrupted in consequence of technical niceties, enacts that no judgment upon any indictment shall be stayed or reversed for the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or *vice versa* : but the entire omission of the words against the form of the statute in an indictment for an offence created by statute, is fatal, as it is not cured by that enactment ; see *Reg. v. Pearson*, R. & M. C. C. R. 313. ii. 113 *et seq.*

Q. 5.—When is the plea of "*autrefois acquit*" a good plea in bar ?

A.—The plea of *autrefois acquit* is a good plea in bar, when the facts contained in the second indictment would, if true, have sustained the first indictment ; or if a prisoner could have been convicted by any evidence on the first indictment, he may successfully plead his acquittal to a second indictment : or if the means of death charged in two indictments be such as would be supported by the same evidence, a plea to the one that the prisoner was acquitted on the other is good : or an acquittal on an indictment against the prisoner and others, is a good plea in bar to an indictment against the prisoner alone : or where the acquittal was the same identical offence ; i. 830–836.*

Q. 6.—An indictment for obtaining goods by false pretences stated in substance after the false pretences, "that the prisoner obtained from one William Roe divers goods and merchandize, with intent then and there to cheat and defraud the said William Roe of the same." Is this a good indictment ?—and if not, in what respect is it defective.

A.—The indictment is bad : an indictment for obtaining goods by false pretences must state them to be the property of some person ; therefore an indictment is defective where it states that the defendant made certain false pretences, by means of which he obtains goods from a certain person, with intent to cheat and defraud

* In any plea of *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully acquitted of the offence charged in the indictment, see 18 V. c. 92, s. 27.—Can. Con. St. c. 99, s. 48.

such person of the same; *ii.* 307; *Reg. v. Norton*, 8 C. & P. 196, per Alderson, B.

Q. 7.—What is the definition of burglary?

A.—Burglary is a breaking and entering the dwelling-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not, *i.* 785.

Q. 8.—How may a man become a "*felo de se*?"

A.—A man may become a *felo de se*, by putting an end to his own life: or by committing some unlawful malicious act, the consequence of which is his own death; so where two men agree to die together, and one of them at the persuasion of the other buys poison and mixes it in a potion, and both drink it, and he who bought and made the potion survives by using proper remedies, and the other dies, he who dies shall be adjudged a *felo de se*: so if a man attempting to kill another, miss his blow and kill himself, or intending to shoot at another mortally wound himself by the bursting of the gun, he is *felo de se*; *i.* 507 *et seq.*

Q. 9.—Give the common law definition of perjury, and subornation of perjury.

A.—Perjury by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not: subornation of perjury, by the common law, is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath; but if the person, incited to take such an oath, should not actually take the same, the person by whom he was so incited is not guilty of subornation of perjury, (yet he is liable to be punished, not only by fine, but also by infamous corporal punishment;) *ii.* 596 *et seq.*

Q. 10.—What words in a statute create a felony?

A.—With regard to the felonies created by statute, not only those crimes which are made felonies in express words, but also all those which are decreed to have or undergo judgment of life and member of any statute, become felonies thereby, whether the word "*felony*" be omitted or mentioned. Where a statute declares that the offender shall, under the particular circumstances, be deemed to have *feloniously* committed the act, it makes the offence a felony, and imposes all the common and ordinary consequences

attending a felony. But where a statute states that an offence, previously a misdemeanor, shall be deemed and construed a felony, instead of declaring it to be such in distinct and positive terms, the offence is not thereby a felony. i. 44.

Q. 11.—When does a misdemeanor merge in a felony? after such merger can there be a prosecution on the misdemeanor?

A.—Where a statute makes that felony which before was a misdemeanor only, the misdemeanor is merged; and there can be no prosecution afterwards for the misdemeanor; but if it gives a new punishment or a new mode of proceeding for what was before a misdemeanor, without altering the class or character of the offence, the new punishment or new mode of proceeding is cumulative only, and the offender may be proceeded against as before for the common law misdemeanor; i. 50.

Q. 12.—What is the distinction between a principal in the second degree, and an accessory; in what cases can there be no accessories?

A.—An accessory is one who, though not present at the committing of the offence, procures, counsels, commands or abets another to commit a felony (i. 30), or knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon, i. 36; a principal in the second degree is one who is present, aiding and abetting at the commission of the act, i. 26, 31. See *Rex v. Winifred & Thomas Gordon*, 1 Leach, 515. In high treason there can be no accessories, but all are principals, on account of the heinousness of the crime. In the case of forgery it is laid down generally in the books that all are principals, and that whatever would make a man accessory in felony would make him a principal in forgery; but this must be understood of forgery at common law, and where it is considered as a misdemeanor. i. 33.

Q. 13.—Is a married woman liable for crimes which she commits in the presence of her husband, and why? Does the rule apply to all crimes? if not, state the exceptions.

A.—A married woman is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft, or even a burglary, by the coercion of her husband, or in his company, which the law construes a coercion. But this is only the presumption of law; so that if upon the evidence it clearly appear that the wife was not

drawn to the offence by her husband, but that she was the principal inciter of it, she is guilty as well as the husband: so if she be in any way guilty of procuring her husband to commit the offence, it seems to make her an accessory before the fact in the same manner as if she had been sole. And she will be guilty in the same manner of all those crimes which, like murder, are *mala in se*, and prohibited by the law of nature. i. 18, 19 *et seq.*

Q. 14.—Give a definition of larceny: is *lucri causa* a necessary impediment? at what time must the *animus furandi* exist to constitute the conversion of goods found a larceny?

A.—Larceny is the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner: in Hammond's case, 2 Leach, 1088, Grose, J., said, that the true meaning of larceny is, "the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker;" ii. 2. It is not essential that the taking should be *lucri causa*, ii. 3. To constitute the conversion of goods found a larceny, the *animus furandi* should exist at the time the prisoner found the article, ii. 18.

Q. 15.—Mention some cases in which homicide is justifiable, and some in which it only amounts to manslaughter.

A.—The officer who, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him, the resistance is justified in proceeding to the last extremity; but, in any misdemeanor short of felony, if the person does not resist, but merely flies to avoid the arrest, and the officer pursues and kills him in the pursuit, it will be murder or manslaughter according to the peculiar circumstances by which such homicide may have been attended; i. 665, 666. Officers in dispersing a mob in case of a riot, are justified in proceeding to the last extremity, in case the riot cannot otherwise be suppressed; and the killing of dangerous rioters may be justified by private persons who cannot otherwise suppress them, or defend themselves from them; i. 667. Gaolers and their officers, in repelling prisoners who resist them, or others in behalf of such prisoners, are justified in using force, and if the party resisting happen to be killed, this, on the part of the gaoler, or his officer, or any person coming in

aid of him, will be justifiable homicide; i. 667. If one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him, so far as to make him desist, yet if he kill him it is manslaughter; so if any man kill any person in defence of an injury done by himself, he is guilty of manslaughter at least; i. 668, 669.

Q. 16.—What is considered night as regards burglary: and does this depend upon common law or statute?

A.—The Imp. Stat. 1 V., c. 86, s. 4, provides, "that so far as the same is essential to the offence of burglary, the night shall be considered to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day," i. 821.

Notes.—Stat. 4, 5 V., c. 25, s. 16,—Can. Con. St. c. 92, s. 10, contains a similar enactment.

Q. 17.—If a prisoner is acquitted on the ground of insanity, how should the verdict be returned, and what is the effect of such finding? Is the question of insanity ever raised before plea?

A.—By the Imp. Stat. 39 & 40 Geo. 3, c. 94, it is enacted, that in all cases when it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity. The effect of such finding is, that the court before whom such trial is had, shall order such person to be kept in strict custody, in such place and in such manner as to the court shall seem fit, until Her Majesty's pleasure shall be known; and it shall thereupon be lawful for Her Majesty to give such order for the safe custody of such person during her pleasure, in such place and in such manner as to Her Majesty shall seem fit. i. 15. If a man in his sound memory commits a capital offence and before arraignment for it he has become mad, he ought not to be arraigned for it, because he is not able to plead to it with the advice and caution that he ought, i. 14.

Q. 18.—If a servant is entrusted with property of his master and converts it, is this larceny or embezzlement? Give your reason.

A.—Where a servant is entrusted with property of his master and converts it to his own use, he is guilty of larceny at common law, for the possession of them by him is the possession of the master, 153 *et seq*; see Paradice's case, 2 East, P. C. 565; Bass' case, 1 Leach, 251, 524.

Q. 19.—Does the crime of larceny necessarily involve a trespass? Does it differ in this respect from embezzlement, and obtaining money by false pretences; and if so, how?

A.—The commission of the crime of larceny involves a trespass in the taking of the goods, ii. 5. Larceny differs in this respect from embezzlement and obtaining money by false pretences, for a trespass is not included in either of those crimes, in the former of which the goods are lawfully in the possession of the person who embezzles them, and in the latter they are obtained (though fraudulently) with the consent of the owner.

Q. 20.—What is the common law offence of arson?

A.—Arson is, at common law, an offence of the degree of felony; and is the malicious and wilful burning of the house of another, ii. 548.

Q. 21.—Can a woman be accessory after the fact, to a felony committed by her husband, and does this rule apply to treason? Give your reasons.

A.—The law has such a regard to the duty, love, and tenderness which a wife owes to her husband, that it does not make her an accessory to felony by any receipt whatever which she may give to him,—considering that she ought not to discover her husband, i. 38. This rule does not apply to treason, for in treason there can be no accessories, but all are principals, on account of the heinousness of the crime, i. 33.

Q. 22.—Are there any crimes for which a woman will be answerable if committed under the control of her husband? If so mention them.

A.—A woman will be answerable for the crimes of treason, murder, or robbery, if committed by her, even in the company with, or by coercion of her husband, and she is punishable as much as if she were sole; and she will be guilty of all those crimes, which, like murder, are *mala in se*, and prohibited by the law of nature; i. 18.

Q. 23.—What is the common law definition of forgery? Is it a

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felony or misdemeanor? How has the statute law with regard to forgery of the several instruments therein mentioned altered it in this respect?

A.—Forgery at common law has been defined as “the fraudulent making or alteration of a writing to the prejudice of another man’s right;” 4 Bla. Com. 247; or more recently as “a false making, a making *malo animo*, of any written instrument, for the purpose of fraud and deceit;” 2 East, P. C., c. 19, s. 1, p. 852; the word “making,” in the last definition, being considered as including even alteration of, or addition to, a true instrument; ii. 318. It is of the degree of misdemeanor only, at common law; but by a variety of statutes (consolidated by Imp. Stat. 1 W. IV. c. 66,) creating various kinds of forgeries, those forgeries were, for the most part, made capital offences, ii. 318; but Imp. Stat. 1 V., c. 84, enacts that no person shall suffer death as a felon upon conviction of the crime of forgery; ii. 412, 413.

Note.—By 10 & 11 V., c. 9,—Can. Con. St. c. 94, punishment of death for the crime of forgery is done away with, and other punishments provided.

Q. 24.—If a person is acquitted on an indictment bad on the face of it, can he plead such acquittal as a bar to a subsequent indictment for the same offence? Give your reasons.

A.—Whenever the indictment whereon a man is acquitted is so far bad that no good judgment could have been given upon it against the prisoner, the acquittal is no bar to a subsequent indictment, because in judgment of law the prisoner was never in danger of his life upon it; for the law will presume, *prima facie*, that the judge would not have given a judgment, which would have been liable to be reserved; i. 836. See *Rex v. Turner*, R. & M. C. C. 239; *Vaux’s case*, 4 Co. 44.

Q. 25.—What is the distinction between robbery and larceny from the person? Is it necessary to constitute robbery that the goods should be actually taken from the person? If not, what taking is sufficient?

A.—The distinction between robbery and larceny from the person is, robbery is a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear, i. 867; and larceny is such stealing any property from the person of another as does

not amount to robbery, (ii. 182,) that is, a taking without violence or other coercion. To constitute a robbery the goods must be actually taken from the person into the possession of the robber, but it will be considered a sufficient taking if his possession of them be but momentary, if he has actually had possession, 871-873.

Q. 26.—How many kinds of homicides, justifiable and excusable, or culpable, are there?

A.—Excusable homicide is of two sorts: either *per infortunium*, by misadventure; or *se et sua defendendo*, upon the principle of self-defence. Justifiable homicide is of several kinds, as it may be occasioned by performance of an act of unavoidable necessity, where no shadow of blame can be attached to the party killing; or by acts done by the permission of the law, either for the advancement of public justice or for the prevention of some atrocious crime. i. 656. Culpable homicide may take place in cases of provocation; in cases of mutual combat; in cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace; in cases where the killing takes place in the prosecution of some criminal, unlawful or wanton act; and in cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority; i. 579.

Q. 27.—How many kinds of crime are there in which one witness is not sufficient for a conviction? Does this depend upon the statute or common law in each case.

A.—Two, treason and perjury, ii. 944. The necessity for two witnesses in the case of treason depends upon various statutes; in the case of perjury it depends upon the common law, ii. 944, 649.

Q. 28.—What is the distinction between murder and manslaughter, and what is the presumption in all cases of homicide?

A.—The distinction is, that murder is the killing any person under the Queen's peace, with malice *prepens*e or *aforethought*, either express or implied by law, i. 482; and manslaughter is that species of homicide in which malice, the main ingredient and characteristic of murder, is considered wanting, i. 579. As a general rule all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears, from circumstances of alleviation, excuse or justification; and it is incumbent

upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him; i. 483.

Q. 29.—Can an indictment, in any case, be sustained against several persons for conspiring to do that which would be lawful for them to do individually? Give your reasons.

A.—An indictment can in many cases be sustained against several persons for conspiring to do that which would be lawful for either or all of them to do individually; for they are not indicted for that act which is of itself lawful, but for conspiring, and a conspiracy of any kind is illegal; for example:—in case of journeymen conspiring to raise their wages, each may insist upon raising his wages if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy; ii. 674. *Rex v. Journeymen Tailors of Cambridge*, 8 Mod. 11; *Rex v. Mawbey*, 6 T. R. 636.

STORY'S EQUITY JURISPRUDENCE.

Question 1.—What is the most general classification of the equitable jurisdiction of the Court of Chancery?

Answer.—The Concurrent jurisdiction, the Exclusive jurisdiction, and the Auxiliary or Assistant jurisdiction. § 78.

Q. 2.—Explain and illustrate the maxim "Equity follows the Law."

A.—It may mean that equity adopts and follows the rules of the law in all cases to which those rules may, in terms, be applicable; or it may mean, that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law. As an illustration, the Statutes of Limitations are in their terms applicable to courts of law only; yet equity, by analogy, acts upon them, and refuses relief under like circumstances. Where a statute or rule of common law is direct, courts of equity are bound by it as much as courts of law; for example, where the positive rule of law is, that the eldest son shall be the heir to his father's undivided estate, equity cannot otherwise dispose of the estate. §§ 64, 64 b.

Q. 3.—What is the meaning of the maxim “Where there is equal equity, the law must prevail?” Mention an ordinary but most important example of the maxim.

A.—In case the defendant has an equal claim to the protection of a court of equity for his title, as the plaintiff has to the assistance of the court to assert his title, the court will not interpose on either side. A court of equity constantly refuses to interfere either for relief or discovery against a *bona fide* purchaser of the legal estate for a valuable consideration, with notice of the adverse title, if he choose to avail himself of the defence at the proper time and in the proper mode. § 64 c.

Q. 4.—Will a purchase by a solicitor from his client be supported in equity under any, and what circumstances?

A.—It will be supported in equity under the condition that the burden of sustaining the purchase, at least within twenty years, is upon the solicitor, § 312 a.

Q. 5.—Will the Court of Chancery decree the cancellation of an instrument which is void at law?

A.—If it be such an instrument as may be used for an improper purpose or oppressive litigation, cancellation will be decreed; but not if it appear on the face of it to be void, as then no improper use can be made of it; §§ 700, 700 a.

Q. 6.—The executor of a mortgagor purchases the mortgage with his own monies, for an amount less than that due on the mortgage: for what sum will a person interested in the equity of redemption be entitled to redeem? Explain the reasons for your answer.

A.—He will be entitled to redeem for the amount expended in the purchase of the mortgage by the executor, because executors are not permitted to purchase the debts of the deceased on their own account, or to derive any personal benefit from the manner in which they transact the business of the estate, § 321.

Q. 7.—The personal estate of a testator is exhausted in the payment of his simple contract debts, which amount to, say, £300. He has bequeathed two legacies of £800 and £400 respectively, but has not charged them on his real estate, which is of ample value. Have the legatees any and what claims upon the testator's real estate? State the principles involved in the foregoing state of facts.

A.—Where no intention appears on the part of the testator that legacies shall be paid out of the real estate, they can only be paid out of the personal assets; for the testator is supposed to know that the latter is the proper fund for payment of legacies, and if he desires them to be paid otherwise, he should express that intention. But if he permits lands to descend to the heir, the legatees will, upon deficiency of personal assets, have the same equities against that land as simple contract creditors; for, if possible, the bounty of the testator should not be disappointed. See Spence, Eq. Jur., ii. 829, 830.

Q. 8.—What is an Injunction?

A.—It is a judicial process, whereby a party is required to do a particular thing or to refrain from doing a particular thing, according to the exigency of the writ, § 861.

Q. 9.—What do you mean by a common injunction; and does such injunction exist under the present practice of the Court?

A.—A common injunction is the writ of injunction issued upon and for the default of the defendant, in not appearing to, or answering the bill. It is also granted where the defendant obtains an order for further time to answer, or for a commission (commonly called a *dedimus*.) to take his answer. § 892. By the Orders of the Court of Chancery for Upper Canada, xxvii., s. 1, no injunction to stay proceedings at law is to be granted for default of answer to the bill; but such injunction may be granted upon interlocutory application, in like manner as other special injunctions are granted.

Q. 10.—Upon what principle does the Court of Chancery decree the specific performance of agreements? And what is the ground of the jurisdiction?

A.—Upon the principle that a compensation in damages in many cases would fall far short of the redress which the injured party should have, which could only be rendered adequate and complete by the specific performance of the agreement: such specific performance courts of law are unable to enforce, and this is the ground of the jurisdiction of Equity; § 714, *et seq.*

Q. 11.—Will the Court of Chancery decree the performance of an agreement for the sale of chattels? Would it, in your opinion, make such decree on an agreement for the sale of a ship? Would it decree the performance of an agreement for the sale

and manufacture of lumber? And give your reasons for your several answers.

A.—Performance of a contract for the sale of chattels will be decreed where pecuniary damages would not be an adequate compensation, § 718. We are of opinion that performance of an agreement for the sale of a ship would not be decreed in ordinary cases unattended by special circumstances requiring such interference, because the damages at law are a complete remedy, inasmuch as with such damages the party may purchase a ship equal in value; but an agreement for the sale and manufacture of lumber should be specifically performed, for the profits in many cases could not be correctly estimated or compensated by a court of law. See *Adderley v. Dixon*, 1 Sim. & Stu. 607.

Q. 12.—Can a creditor be enjoined from proceeding to recover his debt at law after a bill has been filed to administer the estate of the debtor; and if so, at what stage of the action at law and of the suit respectively; and how then is the creditor to recover his debt?

A.—As soon as a decree to account is made in such a suit, brought on behalf of all the creditors, and not before, the creditor can be enjoined from proceeding to recover his debt at law. He must then come in and prove his debt before the master. § 549. Such an injunction may ordinarily be made at any stage of the proceedings at law; but has been refused where judgment at law was obtained prior to the decree to account; see *Lee v. Park*, 1 Keen, R. 714, 719—724.

Q. 13.—In an ordinary foreclosure suit, has the Court of Chancery authority to direct a sale instead of a foreclosure of the mortgaged property, at the instance of the mortgagor alone, without the consent of the mortgagee? Has the rule you state always been the practice of the Court; and if not, state when and by what authority any change has been made in the practice?

A.—In any suit for the foreclosure of the equity of redemption in any mortgaged property, the court, upon the request of the mortgagor, and without the consent of the mortgagee, may direct a sale of such property, upon the condition, that the mortgagor making such request, deposit in the court a reasonable sum of money, to be fixed by the court, for the purpose of securing the performance of such terms as the court may think fit to impose.

This rule has not always been the practice of the court; but such change was made in the practice by Genl. Ord. U. C. xxxii., 2.

Note.—By the practice of our Court of Chancery the amount to be deposited in court by the mortgagor in such case is £20. No deposit is required from an infant defendant; see *Bank of Upper Canada v. Scott*, 6 Grant, 451.

Q. 14.—A person enters into a voluntary covenant for payment of money; his assets are distributed under a decree in Chancery; in what order, with respect to specialty debts for a good consideration, simple contract debts and legacies, shall the debt under the voluntary covenant be satisfied?

A.—A voluntary covenant will not be paid in the course of administration so as to place it prior to debts incurred for a valuable consideration, though by simple contract only; but it will take precedence of legacies, *Jones v. Powell*, 1 Eq. Abr. 84; the assets therefore will be applied in the following order:—in payment, 1st, of specialty debts for a good consideration; 2ndly, of simple contract debts; 3rdly, of the voluntary covenants; 4thly, of legacies. See *Spence*, Eq. Juris. ii. 888.

Q. 15.—Explain and illustrate the rule that parol evidence is admissible to rebut an equitable presumption?

A.—It is an established rule, that, where a man buys land and takes a conveyance in the name of another, and pays the consideration money, the land will generally be held by the grantee in trust for the person who so pays the consideration money; this trust is considered a presumption, or an equity arising out of a written instrument; and parol evidence is admissible to rebut the presumption even where the principal has paid the purchase money, as in such cases the resulting or implied trust is a mere matter of presumption, and may be rebutted by other circumstances established in evidence, and even by parol proofs, which satisfactorily contradict it: thus, where A. took a mortgage in the name of B. declaring that he intended the mortgage to be for B.'s benefit, and that the principal, after his own death, should be B.'s; and A. received the interest therefor during his lifetime; it was held, that the mortgage belonged to B. after the death of A. But a more common case of rebutting the presumption of a trust by parol evidence is where the purchase may be fairly

deemed to be made for another from motives from natural love and affection. §§ 1201-1203, 1531.

Q. 16.—Within what time must a suit for redemption of land mortgaged be brought?

A.—Twenty years from the time when the mortgagee has entered into possession, after breach of the condition, under his title, by analogy to the ordinary limitation of right of entry and actions of ejectment; § 1028 *a*. [See U. C. Con. Stat. c. 88, s. 21.]

Q. 17.—Who should be the parties defendant in a suit to foreclose a mortgage, where the mortgagor has died?

A.—The mortgagor's heir alone, as he is entitled to the equity of redemption; but the personal representative must be made a party where he has any interest in the equity of redemption, (as for example, in the case of a mortgage of a term of years); also where the bill seeks not only a foreclosure, but also payment of a deficiency of the mortgage money out of the personal estate. See Story's Eq. Plead. § 196.

Q. 18.—Who should the parties defendant be in a suit to redeem, where the mortgagee has died?

A.—The heir at law of the mortgagee or other person in whom the legal estate is vested by devise or otherwise, must be made a party because he has the legal title, and is to be bound by the decree: the personal representative of the mortgagee also must be made a party, because generally he is entitled to the mortgage money, when paid. See Story Eq. Plead., § 188.

Q. 19.—Can a suit for specific performance be sustained by a vendee against a vendor on a verbal contract for the sale of lands? if yea, in what case?

A.—Yes; where the parol agreement has been partly carried into execution, on the grounds that if Courts of Equity did not interfere one party would be able to practice a fraud upon the other, § 759.

Q. 20.—Can the defendant, in a suit for specific performance, give evidence that the writing sued on does not contain the true terms of the agreement? if yea, in what case?

A.—The defendant can give evidence to show, that by fraud, accident, or mistake, material terms have been omitted in the written agreement, § 770.

Q. 21.—In what cases will a court of equity relieve against penalties and forfeitures?

A.—In regard to contracts if they stipulate to do anything against law or against the policy of the law, or if they contain repugnant and incompatible provisions. In regard to conditions: relief will be given as to those which are possible at the time of their creation, but afterwards become impossible either by the act of God, or by the act of the party; those which are impossible at the time of their creation; those which are against law or public policy, or are *mala in se* or *mala prohibita*; and those which are repugnant to the grant or gift, by which they are created, or to which they are annexed. §§ 1303, 1304.

Q. 22.—When will a legacy be deemed a satisfaction of a debt due by the testator to the legatee?

A.—The legacy is deemed a satisfaction of the debt when it is equal to, or greater in amount than an existing debt; when it is of the same nature; when it is certain and not contingent; and when no particular motive is assigned for the gift; § 1119.

Q. 23.—What debts may a mortgagee of personal property tack to his original debt?

A.—A subsequent advance made by a mortgagee of chattels would attach by tacking to the property in favour of such mortgagee; § 1034.

Q. 24.—Upon what grounds will a court of equity decree the dissolution of a partnership before the expiration of the time limited for its continuance?

A.—On account of the impracticability of carrying on the undertaking, either at all or according to the stipulations of the articles; on account of the insanity, or permanent incapacity, of one of the partners; and on account of the gross misconduct of one or more of the partners; § 673.

Q. 25.—Can a husband assign his wife's reversionary interest in a chose in action so as to defeat the wife's right of survivorship? Give a reason for your answer.

A.—He cannot, even with her consent; because the assignment is not, and cannot from the nature of the thing, amount to a reduction into possession of such reversionary interest; and her consent during the coverture to the assignment, is not an act obligatory upon her; § 1413.

Q. 26.—What constitutes constructive notice?

A.—Constructive notice is knowledge imputed by the court on presumption too strong to be rebutted that the knowledge must have been communicated, § 399.

Q. 27.—Can an infant purchaser of lands maintain a bill for the specific performance of his agreement to purchase? Give a reason for your answer.

A.—He cannot, because a suit for the same object could not be brought against him, and courts of equity will not decree specific performance upon the application of one party and refuse it in the same case upon the application of another, §§ 734, 787.

Q. 28.—Will the Court of Chancery in Upper Canada enforce the specific performance of a contract entered into by persons both domiciled in Upper Canada, for the sale and purchase of lands in Lower Canada?

A.—It will, for the incapacity of the court to enforce the decree ~~by law~~ constitutes no objection to the right to entertain the suit, § 734.

Q. 29.—Is an executor liable in equity for a debt due by him to his testator's estate?

A.—In equity he is held to be a trustee of the debt for the parties interested in the estate, § 1209.

Q. 30.—Where a man purchases land and pays the purchase money, but takes the conveyance to a third person, who will in equity be deemed the owner?

A.—The land will be held by the grantee in trust for the person who so pays the consideration or purchase money, § 1201.

Q. 31.—How are assets divided; what are the principal differences in the administration of these two species of assets by a court of equity?

A.—Assets are divided into legal and equitable assets. In the administration of assets courts of equity follow the same rules in regard to legal assets, which are adopted by courts of law; and give the same priority to the different classes of creditors which is enjoyed at law,—*æquitas sequitur legem*. But in regard to equitable assets, courts of equity in the actual administration of them, adopt very different rules, and it is a general rule that they shall be distributed equally,—*æquitas est quasi æqualitas*. §§ 551–554.

Q. 32.—In what cases will a bill of peace lie?

A.—Where there is one general right to be established against a great number of persons, and where the plaintiff has after repeated and satisfactory trials, established his right at law and yet is in danger of further litigation and obstruction to his right from new attempts to controvert it, §§ 854-859.

Q. 33.—When will a court of equity open a stated account?

A.—If there has been any mistake or omission, or accident, or fraud, or undue advantage, by which the account stated is vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined, § 523.

Q. 34.—In what cases will a settlement made by a married woman after the conclusion of a treaty of marriage, and without the *priority* of the intended husband, be set aside?

A.—If the settlement is made secretly to her own separate use, or to a person for whom she is under no moral obligation to provide, § 273.

Q. 35.—Is there any, and what, distinction observed by courts of equity in dealing with trusts executed and trusts executory?

A.—Courts of equity in dealing with trusts executed and trusts executory, follow, as regards the former, the rules of law in the interpretation of instruments; but as regards the latter, they often proceed upon an interpretation widely different, § 1066; for example, in the case of executory trusts created under marriage articles, from the nature of the instrument, equity will presume it to be intended for the protection and support of the issue of the marriage, and will, therefore, direct the articles to be executed in strict settlement, unless the contrary purpose clearly appear; and in executory trusts under wills, all the parties take from the mere bounty of the testator, and there is no presumption that the testator means one quantity of interest rather than another, § 994.

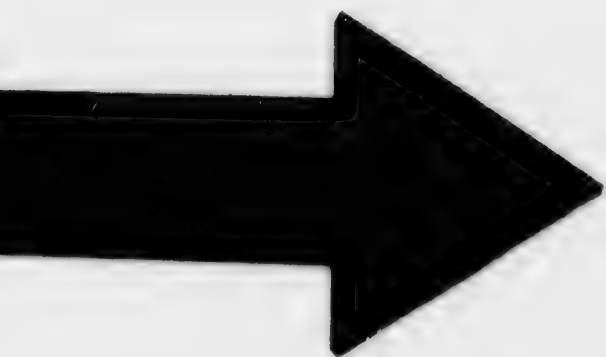
Q. 36.—How is an equitable mortgage by deposit created?

A.—By deposit of title deeds to lands by a debtor with his creditor as a security for the debt, § 1020.

Q. 37.—Mention some cases in which courts of equity will order instruments to be delivered up and cancelled?

A.—Where the instruments may be vexatiously or injuriously used against a party after the evidence to impeach them is lost; where there is a good equitable defence against them, but one





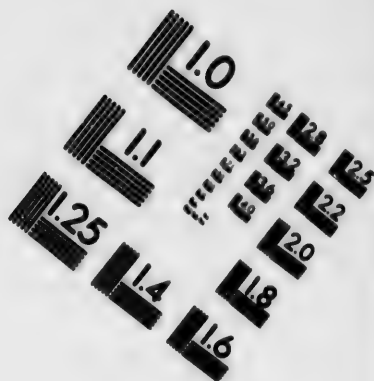
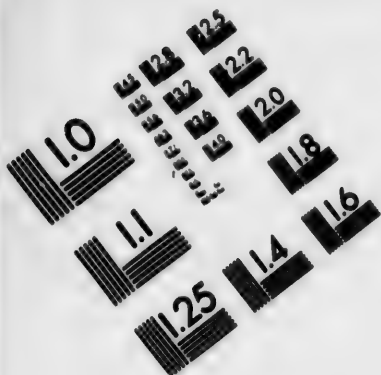
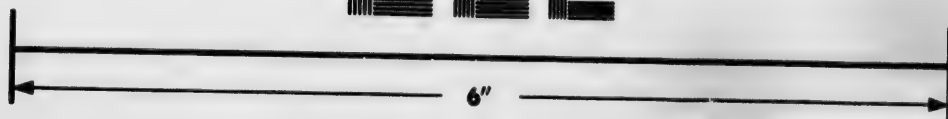
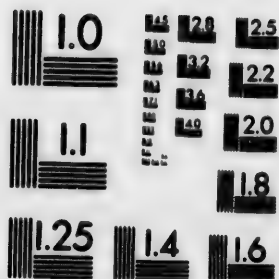


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which cannot be made available at law ; where, by accident, mistake or fraud the instrument fails in its object, or cannot conscientiously be enforced ; where there is actual fraud in the party defendant in which the party plaintiff has not participated ; where there is constructive fraud against public policy, and the party plaintiff has not participated therein ; where there is a fraud against public policy and the party plaintiff has participated therein, but it is against public policy to allow it to stand ; where there is constructive fraud by both parties, but they are not *in pari delicto* ; §§ 694, 695.

Q. 38.—Will a court of equity in any, and what cases, order the specific delivery up of chattels ?

A.—When the remedy at law by damages would be utterly inadequate, and leave the injured party in a state of irremediable loss : also under an agreement of sale, or for an exclusive possession and enjoyment for a term of years, courts of equity will interfere, and grant full relief by requiring a specific delivery of the thing which is wrongfully withheld ; §§ 709, 710.

Q. 39.—Against whom, and in what cases, will a voluntary settlement on a wife and children made after marriage be void ?

A.—A voluntary postnuptial contract will be enforced against the husband and his representatives, and also against his creditors, where it is made in pursuance of a duty on the part of the husband, which a court of equity would enforce ; as if made in consideration of personal property coming to the wife by distribution or bequest to her from her relatives ; § 1877 a.

Q. 40.—What must an attorney show to sustain a purchase from his client upon its being impeached in equity by the client ?

A.—The attorney must shew perfect fairness, adequacy and equity between himself and the client, § 311.

Q. 41.—What is the nature of the vendor's lien for unpaid purchase money ; when does it not arise ?

A.—It is in the nature of a constructive trust, §§ 1217, 1219. The lien does not arise against the purchaser under a conveyance of legal estate made *bond fide* for a valuable consideration without notice, if he have paid the purchase money, § 1228.

Q. 42.—What are the rights of a surety upon payment by him of the debt for which he is surety as to collateral securities held by the creditor ?

A.—The surety is entitled to the benefit of all the collateral securities held by the creditor, § 499.

Q. 43.—In what cases will a bill of interpleader lie?

A.—Where two or more persons severally claim the same thing under different titles, or in separate interests, from another person, who does not claim any title or interest therein himself and does not know to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, § 808.

Q. 44.—What are the rules of courts of equity as to mortgages taken by attorneys for their costs?

A.—They may take mortgage securities from their clients for costs already due, but not for costs to become due. See Smith Eq. Juris. 264.

Q. 45.—Give some illustrations of the doctrine of relief in equity, on the ground of accident.

A.—A party may come into equity for payment of a lost bond or of a lost negotiable unsealed security; he may come into equity when a deed of land has been destroyed, or is concealed by the defendant; so, if a deed concerning land is lost, and the party in possession prays discovery, and to be established in his possession under it, equity will relieve; and where plaintiff is out of possession there are cases in which equity will interfere upon lost or suppressed title-deeds and decree possession to the plaintiff; § 84. Relief will also be granted in the case of payment or default of payment of moneys by accident; or where moneys have been improperly administered by accident; also in the case of defective execution of powers by accident; confusion of boundaries by accident; an omission by accident to endorse a bill of exchange or promissory note; §§ 81-99.

Q. 46.—What is it essential that a purchaser seeking to rescind the contract of sale on the ground of the vendors misrepresentation, should shew?

A.—He must not only establish the fact of misrepresentation, but also that it is in a matter of substance, or important to his interests, and that it actually misled him, § 191.

Q. 47.—Is inadequacy of price in any, and what cases, a good ground of defence to a bill by a purchaser for specific performance?

A.—It is a good defence in cases where it shews gross imposition or some undue influence, § 243.

Q. 48.—What are the rules of courts of equity as to setting aside sales of reversion and reversionary interests?

A.—In all cases of sales of reversion and reversionary interests, courts of equity have extended a degree of protection to the parties, approaching to an incapacity to bind themselves absolutely by any contract; hence it is incumbent upon the party dealing with the reversioner, to establish not merely that there is no fraud, but as the phrase is, to make good the bargain; that is to shew that a fair and adequate consideration has been paid; otherwise courts of equity will grant relief to the reversioner by setting aside the sale; §§ 333-338.

Q. 49.—What precaution should the assignee of a chose in action take to guard against priority being obtained by a subsequent assignee?

A.—The assignee should immediately give notice of the assignment to the debtor; for otherwise, a priority of right may be obtained by a subsequent assignee, § 1047.

Q. 50.—In what cases will a court of equity deem a trust created by recommendatory words in a will? Give an instance in which words of recommendation will be held to raise a trust, and an instance in which such a construction will not be applied.

A.—In cases where the words of the will are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt, if the objects, with regard to whom such terms are applied, are certain, and the subjects of property to be given are also certain, the words are considered imperative and create a trust, § 1068, *a.*: if a testator should give £1000 to A., desiring, wishing, recommending, or hoping that he will, at his death, give the same sum, or a certain part thereof, to B., it would be held to be a trust in favour of B. and A. would be trustee for him, § 1068: where, on the other hand, if the testator devises his leasehold estates to his brother A. forever, "hoping he will continue them in the family," this will raise no trust in the family, for no particulars are pointed out, § 1072.

Q. 51.—In what cases will courts of equity grant injunctions to restrain trespasses?

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parable mischiefs, or to suppress multiplicity of suits, and oppressive litigation, § 928.

Q. 52.—What is the usual decree made in a suit to establish a will?

A.—That the will is well proved, and that it ought to be established, and a perpetual injunction will be granted, § 1417.

Q. 53.—What is the nature of the equitable right of a married woman usually termed her "equity to a settlement?" Out of what property will a settlement be enforced? Will such a settlement be enforced against the husband's assignee for a valuable consideration?

A.—The wife's equity for a settlement is generally understood to be strictly personal to her, and does not extend to her issue, unless it has been asserted and perfected by her, in her lifetime, § 1417; such settlement will be enforced out of the equitable funds, which are brought under the control of the court, and are subject to its order; it is ordinarily administered against the husband's assignee for a valuable consideration; § 1421.

Q. 54.—What forfeitures for breaches of covenants in leases will courts of equity relieve against?

A.—Forfeitures of the estate and an entry for the forfeiture, stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment; for the right of entry is deemed to be intended to be a mere security for the payment of the rent; §§ 1814, 1815.

Q. 55.—Upon the death of one of several co-partners, do his real or personal representatives become entitled to his share of the real estate belonging to the co-partnership? Give reasons for your answer.

A.—The personal representatives become entitled, because a court of equity treats such estate to all intents and purposes as personal estate, which doctrine prevails not only as between the partners themselves and their creditors, but as between the representatives of the partners also, § 674.

Q. 56.—Is a general assignment to a trustee in trust for the creditors of the settlor, and to which no creditor is a party, revocable? What will render such an instrument irrevocable?

A.—The assignment is revocable by the settlor; but if the

creditors have assented to the trust, and given notice thereof to the assignee, it will then be held irrevocable; §§ 1036 b, 1045.

Q. 57.—What is requisite beyond the transfer itself, to perfect an equitable assignment of a chose in action as against subsequent assignees? Does this doctrine apply to the assignment of equitable interests in real estate?

A.—The assignee should give notice to the debtor immediately after the transfer of the chose in action, § 1047. This doctrine applies to the assignment of equitable interests in real estate this far—that a subsequent assignee or incumbrancer of equitable property may acquire a priority over an elder assignee or incumbrancer of the same property, by his giving notice of his title to the trustees of the property, and will be preferred to a prior incumbrancer, who has omitted to give the like notice of his title to the trustees; for the notice is an effectual protection against any subsequent dealing on the part of the trustees; consequently such notice becomes requisite to perfect the equitable assignment; § 421.

Q. 58.—Will the Court of Chancery in any, and what cases, interfere at the instance of a private individual to restrain a public nuisance?

A.—The court will interfere in case the private individual is directly affected by the nuisance; also in case the private individual suffers any injury quite distinct from that of the public in general, in consequence of a public nuisance; §§ 924, 924 a. But in such cases it will only interfere where the fact is made out upon determinate and satisfactory evidence, § 924 a.

Q. 59.—Mention some of the cases in which a bill in equity is demurrable unless the plaintiff's affidavit is annexed to the bill?

A.—Bills for a discovery and relief; also bills for discovery and payment. See Story Eq. Plead. §§ 477, 478.

Q. 60.—Will a bond, void upon its face for illegality, be decreed in equity to be delivered up to be cancelled? Give a reason for your answer.

A.—Courts of equity will not interpose their authority to order a cancellation or delivery up of such instruments; because there can be no danger that the lapse of time may deprive the party of his full means of defence; nor can such a paper throw a cloud over his right or title, or diminish its security; nor is it

capable of being used as a means of vexatious litigation, or serious injury; § 700 *a*.

Q. 61.—When a debt for which a surety is bound, is due and the principal debtor refuses to pay, has the surety any, and what remedy in equity to which he may have recourse without first paying the debt himself?

A.—The surety may come into equity, and compel the creditor to sue for, and collect the debt from the principal; at least if he will indemnify the creditor against the risk, delay and expense, of the suit, § 327.

Q. 62.—In whose favour will a court of equity aid the defective execution of a power?

A.—In favour of parties for whom the person intrusted with the execution of the power is under a moral or legal obligation to provide by an execution of the power, as a *bond fide* purchaser for valuable consideration, a creditor, a wife, and a legitimate child, §§ 95, 189.

Q. 63.—In what cases will a court of equity restrain waste by one of two tenants in common at the instance of the other?

A.—Where the party committing the waste is insolvent; or, where the waste is destructive of the estate, and not within the usual legitimate exercise of the right of enjoyment of the estate; § 916.

Q. 64.—Will the publication of private letters by the receiver be restrained by injunction at the suit of the writer?

A.—The publication of private letters can be restrained, where it has been attempted without the consent of the author, as the purposes of public justice, publicly administered, according to the established institutions of the country, in the ordinary modes of proceeding, require that they should be produced and published; §§ 944, 948.

Q. 65.—In what cases will a bill to perpetuate testimony lie?

A.—In cases where lands are devised by will, away from the heir at law; and the devisee in order to perpetuate the testimony of the witnesses to the will files a bill in chancery against the heir; also in all cases where the party who files the bill can by no means bring the matter in controversy into immediate judicial investigation, which may happen when his title is in remainder, or when he himself is in actual possession of the property, or is in the

present possession of the rights which he seeks to perpetuate by proofs; §§ 1506, 1508.

Q. 66.—Will the Court of Chancery restrain by injunction, proceedings in other courts of a criminal nature? Is there any exception to the general rule on this subject?

A.—The Court of Chancery will not restrain by injunction, proceedings in other courts of a criminal nature. But this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in equity; for if they are, the court possesses power to restrain them personally from proceeding at the same time, upon the same matter of right, for redress in the form of a civil suit, and of a criminal prosecution. § 893.

Q. 67.—Give an illustration of the doctrine of courts of equity as to marshalling assets.

A.—If a specialty creditor whose debt is a lien upon the real estate, receive satisfaction out of the personal assets of the deceased, a simple contract creditor shall, in equity, stand in the place of a specialty creditor against the real assets so far as the latter shall have exhausted the personal assets in the payment of his debt; so if a mortgagee exhaust the personal estate in the payments of his debts, a simple contract creditor will be allowed to stand in the place of the mortgagee; §§ 562, 563.

Q. 68.—Is a settlement of property by a husband upon his wife, to her separate use, without the interposition of any trustee, valid?

A.—Whenever real or personal property is given or devised, or settled upon a married woman, either before or after marriage, and either by her husband or by a mere stranger, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband, and of his creditors also; and in all such cases the husband will be held as a trustee for her; § 1380.

Q. 69.—Give a definition of a *donatio mortis causâ*. What are the distinctions between such a gift and a legacy; and how does it differ from a gift *inter vivos*?

A.—A *donatio mortis causâ* is, properly, a gift of personal property, by a party who is in peril of death, upon condition that it shall presently belong to the donee, in case the donor

shall die of his then illness, but not otherwise. It differs from a legacy in these respects: 1, it need not be proved, nay, it cannot be proved, as a testamentary act; for it takes effect as a gift from the delivery, by the donor to the donee in his lifetime: 2, it requires no assent or other act, on the part of the executor or administrator, to perfect the title of the donee; the claim is not from the executor or administrator but against him. It differs from a gift *inter vivos*, in several respects, in which it resembles a legacy: 1, it is ambulatory, incomplete, and recoverable during the donor's lifetime: 2, it may be made to the wife of the donor: 3, it is liable to the debts of the donor upon a deficiency of assets. §§ 606, 606 a.

Q. 70.—Is there any [and what difference in the principle upon which a court of equity acts in setting aside a purchase by a solicitor from his client, and that upon which it proceeds in setting aside a purchase from a *cestui que trust* by his trustee?

A.—In the former case the solicitor is subject to the onus of proving that no advantage has been taken of the situation of the client; in the latter, it is not sufficient for the trustee to show that no advantage has been taken, but the *cestui que trust* may set aside the transaction at his own option; § 311.

Q. 71.—Give an instance in which the equitable doctrine of marshalling of securities is applicable.

A.—If A. has a right to resort for payment of his debt to two funds, and B. to one, having both the same debtor, A. shall take payment from that fund, to which he can resort exclusively, that by those means of distribution both may be paid, § 643.

Q. 72.—In what cases has the vendor of real estate a lien for his purchase money?

A.—In cases in which the vendor has not agreed to trust to the personal credit of the buyer, § 1220.

Q. 73.—Will a court of equity in any and in what case postpone a registered to a prior unregistered deed?

A.—In case a subsequent purchaser has notice, at the time of his purchase, of any prior unregistered conveyance, he will not be permitted to avail himself of his title against the prior conveyance, § 397.

Q. 74.—Will a court of equity sustain a gift by a married woman to her husband, of her separate estate?

A.—A court of equity will sustain such a gift, but at the same time examine every such transaction with an anxious watchfulness and caution, and dread of undue influence, § 1395.

Q. 75.—Explain the origin of equity jurisprudence; and distinguish between courts of law, and courts of equity strictly so called.

A.—[The answer to the first part of this question would be of such a nature, that it would be impossible to abbreviate it sufficiently to allow its being placed here; therefore we would refer the student to chap. II.]

Courts of law must follow certain prescribed rules and forms and can only give a general and unqualified judgment between party and party, plaintiff and defendant; but courts of equity follow rules and forms which are flexible and capable of being suited to the different postures of cases, and may bring before them all the parties interested in the matter and adjust the rights of all severally; §§ 26, *et seq.*

Q. 76.—Give the general heads of equitable relief, with examples to illustrate your meaning.

A.—1. *Accident*: meaning not only inevitable casualty or the act of Providence, but also such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct in the party; thus where a bond is lost, equity will relieve, as formerly an action could not be brought upon a bond at common law without *profert*, or production before the court; § 78. 2. *Mistake*: or some unintentional act or omission, or error, arising from ignorance, surprise, imposition or misplaced confidence, which is divided into mistake of law and mistake of fact; for example, an agreement entered into in mistake will be remedied in equity; §§ 110, *et seq.* 3. *Fraud*: being any deception, (whether wilful or no,) by which an advantage is gained over another; which is divided into actual fraud and constructive fraud: thus, where one is misled by a misrepresentation of a material fact and thus induced to enter into a contract prejudicial to himself, such contract will be remedied in equity; or where a sale is made to one holding a fiduciary relation to another by that other, equity will interfere and see that no injustice is done to the vendor; §§ 184 *et seq.*

Q. 77.—Explain “marshalling” and “substitution” or “subrogation.”

A.—“Marshalling” is the arrangement of assets or securities so as to provide for the satisfaction of claims upon them according to the rights, priorities or equities existing in respect of such funds or securities, between the several parties holding such claims, §§ 550 *et seq.*, 633 *et seq.* “Substitution” is where one creditor has a right to resort for payment to one of two funds, and another creditor has a right to resort to one only of those funds, if the first creditor elect to take payment out of the latter fund, the other creditor will by substitution be allowed to stand in the place of the first creditor and have payment out of that fund to which he had at first no claim, §§ 567, 636—638. “Subrogation” is the principle by which a surety paying the debt, is entitled to stand in the place of the creditor, and to have a right to the benefit of all collateral securities held for the debt by the creditor, §§ 499—502 *b.*

Q. 78.—What is the nature of the remedy by “injunction?”

A.—Injunctions issued by courts of equity, partake of the nature of interdicts according to the Roman law, and are applied to the same general purposes; that is to say, to restrain the undue exercise of rights, to prevent threatened wrongs, to restore violent possessions, and to secure the permanent enjoyment of the rights of property; §§ 865—863.

Q. 79.—What are “constructive frauds?” and state the ground of the interference of courts of equity in cases of this kind.

A.—Such acts or contracts, as although not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests deemed equally reprehensible with positive fraud, § 258; and the ground upon which courts of equity interfere, is not upon any notion of damage to the individuals concerned, but from considerations of public policy, or of the rights of third persons, §§ 259, 260, 307, 328.

Q. 80.—How far are such frauds affected by Provincial Statutes?

A.—By 9 V. c. 34, s. 6—U. C. Con. St. c. 89, s. 44, a prior unregistered conveyance of lands is adjudged fraudulent and void

as against a subsequent purchaser for valuable consideration (without notice) who registers his conveyance.

Q. 81.—Mention the principal incidents of "suretyship."

A.—The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction; any misrepresentation, express or implied, or concealment of material facts, or any undue advantage taken by the surety, will invalidate the contract; he will also be discharged from liability if without his consent any stipulation or agreement injurious to him be made between the creditor and the debtor, or any act done or omitted to his injury or inconsistent with his rights; but the surety, though not bound by anything to his disadvantage, will be entitled to the benefit of all transactions to his advantage, for example, the giving of collateral or additional security by the debtor to the creditor; §§ 324, *et seq.*

Q. 82.—What are the various grounds of defence to a suit for specific performance?

A.—That the specific performance sought for would be against public policy, 736; absence of consideration, §§ 717, 718; or that the contract is founded on fraud, accident or mistake, §§ 750, 770; that the party seeking specific performance has disregarded his reciprocal obligations; or has been guilty of gross laches, §§ 736, 771; that the specific performance sought for is or has become incapable of being substantially performed; or that from change of circumstances it would be inequitable to compel performance, §§ 736, 775; that an adequate remedy may be had at law, §§ 707, 718.

Q. 83.—Explain what is meant by tacking; how far is the doctrine affected by our registry laws, and in what cases may it still be applied?

A.—Tacking means the uniting of securities, given at different times, so as to prevent any intermediate purchasers from claiming a title to redeem or otherwise to discharge one lien, which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title, § 412. By our registry laws, (13, 14 V. c. 63, § 4,—U. C. Con. St. c. 89, § 56,) the doctrine of tacking having been found productive of injustice, it is enacted that every deed executed subsequent to the first day of January, 1851, a memorial whereof has been or may be duly registered, shall

be deemed effectual both in law and in equity, according to the priority of such registration; and when no memorial of such deed has been duly registered, then such deed shall be deemed effectual, both at law and in equity, according to the priority of time of execution. The doctrine of tacking can still be applied in the case of mortgages of chattels.

Q. 84.—Under what circumstances will a surety be held to be discharged in equity?

A.—The surety will be discharged if any stipulations or agreements be made between the debtor and the creditor which are not communicated to him, and which are inconsistent with the terms of his suretyship or are prejudicial to his interests, § 324: or if a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; § 325.

Q. 85.—Explain the doctrine of specific performance, and whether it will be put in force with respect to land in foreign countries?

A.—By the common law every contract to sell or transfer a thing, if there is no actual transfer, is treated as a mere personal contract; and as such, if it is unperformed by the party, no redress can be had, except in damages, or to perform the contract at his sole pleasure. But courts of equity have deemed such a cause wholly inadequate for the purposes of justice; and they have not hesitated to interpose, and require from the conscience of the offending party a strict performance of what he cannot, without manifest wrong or fraud, refuse. § 714. A bill for a specific performance of a contract respecting lands may be entertained by courts of equity, although the land is situate in a foreign country, if the parties are resident within the territorial jurisdiction of the court, § 743.

Q. 86.—When is a purchase deemed a trust, and when not?

A.—A purchase is deemed a trust, where a man buys land in the name of another, and pays the consideration money, in which case the land will generally be held by the grantee in trust for the person who so pays the consideration money, § 1201: but this doctrine is strictly limited to cases where the purchase has been made in the name of one person, and the purchase money has

been paid by another : therefore a purchase would not be deemed a trust, where a man employs another by parol as an agent, to buy an estate, and the latter buys it accordingly in his own name, and no part of the purchase money is paid by the principal, § 1201 a.

Q. 87.—What defences are peculiar to equity ?

A.—The lapse of time, analagous to the Statute of Limitations at common law : a former decree in equity between the same parties and concerning the same subject matter: an account stated, in defence to a bill to account: plea of purchase for valuable consideration without notice: and the want of proper parties to the bill, which defence goes farther than a plea in abatement at common law, which can only set up the non-joinder of the parties who have a direct legal interest, while in equity an objection may be made upon non-joinder of any persons who have interests, however remote, in the cause, and who would be affected by the decree ; §§ 1518-1526.

Q. 88.—Will a court of equity direct the delivery up and cancellation of a forged instrument before the forgery has been established by a trial at law ?

A.—Forged instruments may be decreed to be delivered up, without any prior trial at law on the point of forgery, § 701.

Q. 89.—What is a bill of discovery ?

A.—Every bill may properly be deemed a bill of discovery ; but that which in equity is emphatically called a bill of discovery, is a bill which asks for no relief, but simply seeks a discovery of facts resting in the knowledge of the defendant, or of deeds or writings or other things in the possession or power of the defendant, in order to maintain the right or title of the party asking it, in some suit or proceeding in another court ; §§ 689, 1483.

Q. 90.—What is a constructive trust ? Give some examples.

A.—A constructive trust may be defined to be a trust which is raised by construction of equity, in order to satisfy the demands of justice, without reference to any presumable intention of the parties, §§ 1195, 1254. A constructive trust arises where a person who is only joint owner, acting *bonâ fide*, permanently benefits an estate by repairs or improvements, for a lien or trust arises in his favour, in respect of the sum he has expended in such repairs or improvements ; so, where a party lawfully in possession under a defective title has made permanent improvements, he is entitled

to a lien or trust for the amount so expended, and if relief is asked in equity by the true owner, he will be compelled to allow for such improvements; for he who seeks equity must do equity; §§ 1234-1237.

Q. 91.—Can a suit for specific performance be maintained by a purchaser of land against the vendor where the contract is signed by the vendor only?

A.—Yes; the want of mutuality in the signature merely is no objection to its enforcement, § 736 *a*.

Q. 92.—When will the widow of a testator be bound to elect between her dower, and a legacy given her by the will?

A.—When there is some express declaration of the husband to that effect, for it must appear by clear implication, that it was his intention to put his wife to the election between the bequest and the dower, § 632 *a*. Lord St. Leonards, when Chancellor of Ireland, in *Hall v. Hill*, 1 Dru. & Warren, 107, held that to put the wife to her election, there must be a clear repugnance between the devise to the wife, and her right to have dower set out by metes and bounds, § 1088 *a*.

Q. 93.—In what manner can a mortgagee of personalty enforce his security?

A.—The mortgagee of personalty may upon due notice sell the personal property mortgaged, without being put to the necessity of bringing a bill for foreclosure, § 1031.

Q. 94.—When does a bill in equity lie for an "account?"

A.—When there is no adequate remedy at law, a bill in equity lies in matters of account, growing out of privity of contract, where there are mutual accounts, and also where the accounts are on one side, but a discovery is sought, and is material to the relief, § 459.

Q. 95. What is "accident" as one of the heads of equitable jurisdiction?

A.—"Accident" is inevitable casualty, or the act of Providence: also such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct in the party, § 78.

Q. 96.—Distinguish between "accident" and "mistake" and give examples of each?

A.—"Accident" is such an occurrence as may arise, but is not

in consequence of any negligence or misconduct in the party ; "mistake" as contradistinguished from it, is some unintentional act, or omission or error, arising from ignorance, surprise, imposition or misplaced confidence ; § 110. An example of the former : upon a lost bond no action could formerly be maintained as there could be no *profert* of the instrument, without which the declaration would be fatally defective ; and hereupon equity interferes for the relief of the obligee ; § 81. For an example of the latter : where A. buys an estate of B. to which he (B.) is supposed to have an unquestionable title, but it turns out upon due investigation of the facts, unknown at the time to both parties, that B. has no title, as (if there be a nearer heir than B. who was supposed to be dead, but is in fact living,) equity will relieve the purchaser and rescind the contract, § 141.

Q. 97.—Mention cases in which courts of equity have concurrent jurisdiction with courts of law.

A.—Courts of equity have concurrent jurisdiction with courts of law in cases of accident, (§ 78,) mistake, (§ 110,) fraud, (§ 184;) account and incident thereto, apportionment, contribution and average ; liens, rents and profits ; tithes and moduses ; waste ; administration, legacies and marshalling of assets ; confusion of boundaries ; dower ; marshalling of securities ; partition ; partnership ; and rents ; § 441 *et seq.*

Q. 98.—Distinguish between a bailment and a trust.

A.—A bailment is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee. (See Bl. Com. ii. 451.) A trust is a beneficial interest in, or a beneficial ownership of, real or personal property, unattended with the possessory and legal ownership thereof (see Smith Eq. Man. 99.) The principal distinction is, that the former is of a personal property and must be attended with the possession thereof ; the latter is of real and personal property unattended with the possession. §§ 60, 534, 960-982.

Q. 99.—When is surprise or mistake a ground of equitable jurisdiction ?

A.—Surprise is a ground of equitable jurisdiction, when accompanied with fraud and circumvention, or at least by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or manage-

ment to mislead him ; also if proper time is not allowed the party and he acts improvidently, if he is importunately pressed, if those in whom he places confidence use strong persuasions, if he is not fully aware of the consequences but is suddenly drawn into the act, if he is not permitted to consult disinterested friends or counsel before he is called upon to act, in circumstances of sudden emergency, or unexpected right or acquisition, surprise will be a ground of equitable jurisdiction. § 251.

Mistake is a ground of equitable jurisdiction, when it is, in its large sense, the result of accident, in some unintentional act, or omission, or error arising from ignorance, surprise, imposition, or misplaced confidence, § 110.

Q. 100.—When is relief in equity with respect to sureties more complete than at law ?

A.—When an account and discovery is wanted ; or where there are numerous parties in interest, which would occasion a multiplicity of suits ; § 496.

Q. 101.—How, and when are receivers appointed, and what are their rights and duties ?

A.—Receivers are appointed by the Court of Chancery, § 826 : when such appointment is directed, it is made for the benefit and on behalf of all the parties in interest, and not for the benefit of the plaintiff, or of one defendant only ; and such appointment may be granted in any case of equitable property upon suitable circumstances : and, where there are creditors, annuitants and others, some of whom are creditors at law claiming under judgments, and others are creditors claiming upon equitable debts ; if the property be of such a nature, that, if legal, it may be taken in execution, it may, if equitable, be put into possession of a receiver, to hold the same and apply the profits under the direction of the court for the benefit of all the parties, according to their respective rights and priorities ; § 829 : a receiver, will also be appointed in cases where an estate is held by a party, under a title obtained by fraud, actual or constructive, § 834. The receiver, when appointed, is treated as virtually an officer and representative of the court and subject to its orders, § 831 : his rights and duties are,—upon his appointment as receiver of the rents and profits of real estate, if there are tenants in possession of the premises they are obliged to attorn ; and the court thus becomes virtually, *pro hac vice*, the

landlord; and the receiver is entitled to possession of the premises, § 833: when in possession he has very little discretion allowed, and must apply from time to time to the court for authority to do such acts as may be beneficial to the estate, § 833 a.: if the property is in the possession of a third person, who claims a right to retain it, it becomes the duty of such receiver to proceed by a suit in the ordinary way to try his right to it, or the plaintiff in equity should make such third person a party to the suit, and apply to the court to have the receivership extended to the property in his hands; § 833 b.

Q. 102.—How are purchases from persons in fiduciary relations regarded in equity?

A.—They are regarded with so great suspicion that the purchaser will be compelled to show that the purchase was made in perfect good faith, otherwise they will be set aside: and in the case of a purchase by a trustee from the *cestui que trust*, the latter may avoid the sale at his option; §§ 311, 322, 323.

Q. 103.—What consequences result from the principle that a surety is entitled to all the securities of the creditor?

A.—That the surety has, as regards such securities, precisely the same rights the creditor had, and is entitled to stand in his place, § 499 a.

Q. 104.—Distinguish between actual and constructive notice.

A.—Actual notice is where knowledge of the fact is brought directly home to the party: constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted; § 399.

Q. 105.—In what cases will an interpleader lie at law and in equity, and when not?

A.—It will lie in cases where two or more persons severally claim the same thing under different titles, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties, § 806: at law the process of interpleader arose in the case of a joint bailment, or where the depository had found the thing in controversy, and the claimants brought several

actions of detinue against the depositary ; and was allowed in no personal action, except detinue, and then only when it was founded either in privity of contract between the depositary and the several claimants, or upon a finding ; §§ 801-804 : a bill of interpleader cannot be maintained by any person, who does not admit a title in two claimants, and does not also show two claimants in existence capable of interpleading, § 821. A court of equity will not exercise its jurisdiction where the party can have an adequate remedy at law, § 807.

Q. 106.—What is the doctrine of election ?

A.—Election is the choosing between two rights by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both, § 1075. (See Smith Eq. Man. 303.)

Q. 107.—Distinguish between a bill for account and an action of account at law.

A.—A bill for account may be maintained in all cases, growing out of privity of contract, where there are mutual accounts, or where there are accounts on one side and a discovery is sought, § 459 : an action of account lies only in cases where there is privity in deed or in law between the parties, or between merchant and merchant, § 445.

Q. 108.—Give the principal rules attending the administration of assets in equity.

A.—Assets are now generally applied in the payment of debts, in the following order : first, the general personal estate is applied, unless exempted expressly, or by plain implication ; secondly, any estate particularly devised for the payment of debts and only for that purpose ; thirdly, estates descended to the heir ; fourthly, estates specifically devised to particular devisees, but charged with the payment of debts ; (§ 577) ; fifthly, lands comprised in a residuary devise ; sixthly, specific legacies and lands specially devised ; seventhly, freehold estates over which the testator has a general power of appointment, and which he appoints by his will. Smith's Eq. Man. 223.

Q. 109.—Distinguish between revocable and irrevocable assignments.

A.—Revocable assignments are such as are made voluntarily by the debtor for the benefit of the creditors, whether specially named

in the instrument, or by a general description, if such creditors are not parties thereto, and have not executed the same, §. 1036 *b*. And such assignments will become irrevocable on the assent thereto, upon notice, of the creditors, §§ 1036 *b*, 1045. An irrevocable assignment is one to which the creditors are parties, and which they execute.

Q. 110.—When is a misrepresentation fraudulent?

A.—When it is a wilful misrepresentation of a fact which is material, and not a matter of opinion or one which the party deceived might have ascertained upon reasonable enquiry, and when the party is actually misled by it, §§ 191–203.

Q. 111.—“*Qui prior est in tempore, potior est in jure.*” Is this principle of universal application in equity?

A.—As between persons having only equitable interests, if their equities are in all other respects equal, their “priority of times gives the better equity,” or, *qui prior est in tempore, potior est in jure*; but this is not applicable unless their equities are equal, § 64 *d*. Smith’s Eq. Man. 26.

Q. 112.—How must trusts be evidenced? And what exceptions are there to the general rule?

A.—The Statute of Frauds requires all declarations of trust of any lands, tenements or hereditaments to be evidenced by some writing signed by the party declaring the same, or by his last will in writing. The statute excepts trusts arising, transferred, or extinguished by operation of law; also declarations of trust of money secured on real estate, or of chattels personal; which need not be so evidenced, § 972. See 1 Sp. 497, 498; 2 Sp. 19, 20, 897; and Smith’s Eq. Man. 100.

Q. 113.—What difference is there in the nature of a contract at law and in equity?

A.—By the common law every contract to sell or transfer a thing, if there is no actual transfer, is treated as a mere personal contract: and as such, if it is unperformed by the party, no redress can be had, except in damages; thus allowing the party the election either to pay damages or to perform the contract at his sole pleasure: but courts of equity have deemed such a course wholly inadequate for the purposes of justice; and they will therefore interpose, and require from the conscience of the

offending party a strict performance of what he cannot, without manifest wrong or fraud, refuse; § 714.

Q. 114.—Give examples of the jurisdiction of "Auxiliary Equity?"

A.—Bills of discovery, bills to perpetuate testimony, and bills to take testimony *de bene esse*, pending a suit; all of which are employed as auxiliary to the remedial justice of other courts, § 1482.

Q. 115.—Under what circumstances may a discovery be compelled, notwithstanding a forfeiture or penalty may result therefrom?

A.—When the bill charges the parties with corruption, fraud, or other gross misconduct, they are compelled to make the discovery, and to answer the bill, § 1500. Smith Eq. Man. 400.

Q. 116.—When is a cross bill proper?

A.—A cross bill is properly brought by a defendant against the plaintiff in the same suit, or against other defendants in the same suit or against both, touching the matters in question in the original bill, either to obtain a necessary discovery of fact in aid of the defence to the original bill, or to obtain full relief to all the parties, touching the matters of the original bill. Story, Eq. Plead. § 389.

Q. 117.—What should an answer contain?

A.—An answer should contain matter which either controverts the facts stated in the bill, or which controverts some of them and states other facts to shew the rights of the defendant in the subject of the suit; or it may admit the truth of the case made by the bill, and, either with or without stating additional facts, submit the questions arising upon the case thus made to the judgment of the court. Story Eq. Plead. § 849.

Q. 118.—How far does equity interfere in matters of rent?

A.—Equity will relieve in cases where there is no adequate or complete remedy at law for the recovery of rent, either by an action or distress; for instance, where the premises out of which the rent is payable are uncertain; or where the time or amount of payment is uncertain; or where a discovery or an apportionment is wanted; or where the remedy at law is obstructed or evaded by fraud, or is gone without laches: or where none ever existed; or where it is inadequate, incomplete or doubtful; § 684—687.

Q. 119.—What exceptions prevail to the general rule, as to parties to suits?

A.—An exception to the general rule occurs where it is utterly impracticable to make the proper or necessary parties; as where parties whose interests will not be prejudiced by the decree and who are not indispensable to the just ascertainment of the merits of the case, are without the jurisdiction and cannot be reached by process of the court, Story Eq. Plead., §§ 78, 82: or where the parties cannot be found, *ib.* § 90: or in the case where a personal representative is a necessary party, but there is none such in existence, *ib.* § 91: another exception to the general rule is, where the parties are exceedingly numerous, and it would be impracticable to join them without great inconvenience, unless the decree would directly affect their interests: or where one or a small number of them, may be taken to represent the interests of the whole, *ib.* §§ 94 *et seq.*: also where there is a known interest, but one which will not be bound or concluded by the decree, courts of equity will sometimes dispense with the persons representing that interest, being made parties, *ib.* §§ 151 *et seq.*

Q. 120.—What is the right of contribution, and between whom will it be enforced?

A.—Contribution is where a charge or liability is divided amongst several persons interested, who are required to contribute thereto in due proportion according to their respective interests. It will be enforced in the case of any persons in respect of a charge or claim affecting the interests of them all; as for example, where a man, owning several acres of land, is bound by a judgment operating as a lien upon the land, and afterwards aliens one acre to A., another to B., and another to C., &c, if one alienee is compelled, in order to save his land, to pay the judgment, he will be entitled to contribution from the other alienees. §§ 477 *et seq.*

Q. 121.—Distinguish between "legal" and "equitable" assets.

A.—Legal assets are those which by law are directly liable, in the hands of the executor or administrator, to the payment of debts and legacies, § 551; equitable assets, those which are chargeable with the payment of debts or legacies in equity, and can only be reached by the aid of a court of equity, § 552. See Smith Eq. Man. 221.

Q. 122.—When will an agreement to enter into a partnership be specifically performed? and when not?

A.—It will be specifically performed when the agreement is for a limited time, and to furnish a share of the capital stock; but not if the partnership can be dissolved instantly, at the will of either party; § 666.

Q. 123.—What is "equitable set off?"

A.—It is relief granted in all cases in courts of equity where there are mutual and independent debts, yet there is a mutual credit between the parties, founded at the time on the existence of some debt due by the crediting party to the other; or where peculiar equities intervene. And where there are cross demands, of such a nature that if both were recoverable at law, they would be the subject of a set-off, there, if either of the demands be a matter of equitable jurisdiction, the set-off will be enforced in equity. § 1435, *et seq.*

Q. 124.—What is "auxiliary" equity?

A.—"Auxiliary equity" is that part of equity jurisdiction which is auxiliary or assistant to courts of Law in the administration of justice by them, in removing legal impediments to the fair decision of a question depending therein, obtaining a discovery of evidence, perpetuating evidence, and the like. Chap. XLII.

Q. 125.—When does equity relieve against the breach of a condition? and give instances.

A.—When a penalty or forfeiture appears to have been inserted merely to secure the performance of some condition, equity regards the performance of such condition as the substantial object of the party interested therein; and if a compensation can be made for the nonperformance thereof, it will relieve against the penalty or forfeiture, by simply decreeing a compensation in lieu of the same, proportionate to the damage really sustained; §§ 1314, 1320.

Q. 126.—What relief does equity afford to sureties?

A.—Equity will relieve a surety from any undue advantage gained upon him, or from the consequences of any fraud upon him, as for example any misrepresentation or concealment in respect of his suretyship, or of any act done by the creditor, without the consent of the surety, which may be prejudicial to him or increase his risk. Equity also will at the instance of the surety compel the creditor to pay the debt, or will compel the creditor, upon being indemnified

against the expense by the surety, to sue for it. The surety upon paying the debt of his principal, is entitled to be substituted in the place of the creditor as to all securities held by the latter for the debt. §§ 324-327, 499-502 *b*, and see §§ 730, 883. If one of several sureties pay the debt, equity will compel the others to contribute proportionally. § 492.

Q. 127.—Explain the maxim "*Æquitas sequitur legem*," and state what (if any) exceptions exist thereto.

A.—This maxim may mean that equity is bound by the positive rules of law in all cases to which those rules may, in terms, be applicable; or it may mean that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law. An exception is made to the rule in cases where there are peculiar circumstances rendering it absolutely necessary to deviate from the rule, or creating an equitable obligation in one of the litigant parties, and an equitable correlative right in favour of another litigant party, and requiring a different course to be taken in the particular case. §§ 64, 64 *a*; Smith Eq. Man. 13.

Q. 128.—In what cases has equity jurisdiction exclusive of the common law?

A.—In cases where there are rights which courts of law do not recognize at all, or which, if they do recognize them, they leave wholly to the conscience and good-will of the parties, § 29. This head of equity jurisdiction is divided into two branches, the one dependent upon the subject matter, the other upon the nature of the remedy; the former comprehending Trusts, express or implied, direct or constructive, created by the parties or resulting by operation of law; and the latter comprehending all those processes or remedies, which are peculiar and exclusive in Courts of Equity, and through the instrumentality of which they endeavour to reach the purposes of justice, in a manner unknown or unattainable at law; §§ 960, 1464.

Q. 129.—Will a court of equity relieve against acts performed under mistaken notions of law?

A.—In regard to mistakes in matters of law, it is a maxim that *ignorantia legis non excusat*, § 111 *et seq.*; but where the mistake is one of title, arising from ignorance of a principle of law, of such constant occurrence as to be understood by the community at large, this is sufficient to entitle the party to relief, §§ 121 *et seq.*, 137.

Q. 130.—How far is the maxim "*Caveat emptor*," applicable in case of specific performance?

A.—In case of specific performance the maxim *caveat emptor* is applicable, unless there be some misrepresentation or artifice, to disguise the contract or the thing sold, or some warranty as to its character or quality, § 212.

Q. 131.—State the several divisions of the subject matter which are discussed in the first volume, beginning with "*Accident*."

A.—Accident, mistake, actual or positive fraud, constructive fraud, account, administration, legacies, confusion of boundaries, dower, marshalling of securities, partition, partnership, matters of rent, peculiar remedies in equity, discovery, cancellation and delivery up of instruments, specific performance of agreements and other duties.

Q. 132.—What are bills *quia timet*? And give an example.

A.—They are proceedings in the nature of writs of prevention, to accomplish the ends of precautionary justice, and are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done, § 826. For example, where a party seised of lands in fee, grants a rent charge in fee issuing thereout, and afterwards devises the lands to A. for life with remainder to B. in fee, B. may maintain a bill *quia timet* to compel A. to pay the arrears during his life, for fear that otherwise the whole would fall on his reversionary estate, § 848.

Q. 133.—Define implied as contra-distinguished from express trusts.

A.—Implied trusts are those which are founded in the unexpressed, but presumable intentions of the parties, or which arise by operation of law; whereas express trusts are those which are created by the direct and positive acts of the parties by some writing, deed or will; §§ 980, 1195, 1254.

Q. 134.—What is the vendor's lien? State the probable origin and present extent of the doctrine.

A.—The vendor's lien is his right, recognized by equity, to resort for payment of the purchase money to the property sold, in the hands of the vendee and his heirs and other privies in estate, and also of subsequent purchasers having notice that the purchase money is unpaid, all of whom are held to be trustees for the vendor to the extent of such lien, § 1217. The probable origin of

this doctrine is the Roman Law, from which it was imported into the equity jurisprudence of England, § 1221. Such lien is ordinarily confined to cases of the sale of immovables, and does not extend to movables, where there has been a transfer of possession; § 1222.

Q. 135.—What is requisite to constitute a valid assignment of equitable property?

A.—No particular form is requisite to constitute a valid assignment of equitable property; thus any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment of that fund; or a debt may be assigned by parol; § 1047.

Q. 136.—What jurisdiction has equity in cases of awards?

A.—In cases of fraud, mistake, or accident, courts of equity may, in virtue of their general jurisdiction, interfere to set aside awards upon the same principles and for the same reasons which justify their interference in regard to other matters, where is no adequate remedy at law, § 1451.

Q. 137.—When will equity decree the cancellation of a deed? and on what principle is the jurisdiction exercised?

A.—The Court of Chancery frequently cancels, or rescinds, or orders the delivery up of instruments which have answered the end for which they were created; or of instruments which are voidable; or of instruments which are in reality void and yet apparently valid. This is done upon the principle, as it is technically called, *quia timet*, that is, for fear that such instrument may be vexatiously or injuriously used, when the evidence to impeach them may be lost or diminished; or for fear that they may throw a cloud or suspicion over the plaintiff's title and interests. § 705. See Smith's Eq. Man. 324.

Q. 138.—Distinguish between the Stat. 13 Eliz. and the Stat. 27 Eliz., as to fraudulent conveyances.

A.—It has been determined that by the Stat. 13 Eliz. c. 5, if a person makes a conveyance of any property which is liable to the payment of debts, (unless for valuable consideration and *bona fide*, to a person who has no notice of a fraudulent intent,) and at the same time, or immediately afterwards, he is indebted to such an amount that he has not ample means available to pay the debts, such conveyances are fraudulent and void as against the creditors, §§ 352-374, Smith Eq. Man. 79. And by the Statute 27 Eliz. c. 4, the

object of which was to give full protection to subsequent purchasers against voluntary prior conveyances, a prior conveyance is deemed void as against a subsequent purchaser or mortgagee, whether with or without notice, §§ 425-433.

Q. 139.—How may incumbrances upon an estate be extinguished?

A.—If a tenant in tail in possession pays off an incumbrance, it is extinguished, unless he has kept it alive by taking an assignment, or by some act which imports a positive intention to hold himself out as a creditor of the estate; but it is not extinguished by payment by a tenant in tail in remainder or a tenant for life; § 486. Where there are several in interest, incumbrances are discharged by contribution by them in due proportion, §§ 486 *et seq.*

Q. 140.—State the two kinds of mistakes, and the general rules as to the interference of the court in each case.

A.—Mistakes in matters of law, and mistakes in matters of fact, § 110. In regard to mistakes in matters at law, it is a maxim that *ignorantia legis non excusat*, yet there are a few exceptional cases where equity will interfere, §§ 111 *et seq.*; and in regard to mistakes in matters of fact, relief will be granted where the mistake is unilateral, and the fact was material to the act or contract, §§ 117, *et seq.*; also Smith's Eq. Man. 41.

Q. 141.—What are the rights of the *cestui que trust* in respect of a purchase of his estate by his trustee? and on what principle are these rights founded?

A.—In all cases where a purchase has been made by a trustee on his own account of the estate of his *cestui que trust*, although sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether *bonâ fide* or not; upon the principle that the trustee is bound not to do anything, which can place him in a position inconsistent with the interests of the trust, or which have a tendency to interfere with his duty in discharging it; §§ 321, 322.

Q. 142.—When is time deemed in equity to be the essence of the contract?

A.—When the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract, § 776.

Q. 143.—What is the effect when property, real or personal, is willed in trust, without the appointment of a trustee?

A.—In such a case a clear trust is created; of which courts of law will take no cognizance; but which equity will enforce, declaring who is the proper party to execute the trust, or if no one is designated, by proceeding to execute the trust by its own authority; § 1060.

Q. 144.—Against what classes of persons will the vendor's lien attach? and what is the effect on the lien of a receipt for the consideration money expressed in, or indorsed on, the deed?

A.—Against the vendee and his heir, and against volunteers claiming under him; against purchasers under him, with notice that he had not paid the purchase money; against purchasers even without notice, having an equitable title only; against assignees claiming by a general assignment under the bankrupt and insolvent laws; against assignees claiming under a general assignment made by a failing debtor for the benefit of creditors; and against the judgment creditor of the vendee, at least before the actual conveyance of the estate has been made to him. The lien is not gone even if upon the face of the conveyance the consideration is expressed to be paid, or if a receipt be endorsed. §§ 1225, 1228.

JUSTINIAN'S INSTITUTES.

Question 1.—Under the civil law up to what age did the state of tutelage last? and in what relation did minors stand to parents and guardians in regard to personal control, and the control of the property?

Answer.—In the case of women twelve years, and fourteen years in the case of men, *Lib. i., t. 23*. In the relation of minor and parent the power of the parent gave the father whatever the son acquired, stripped the son of all his rights, and made him in some respect, part of his father's property: this power, therefore, was chiefly for the father's benefit. But guardianship, though it conferred on the tutor a power to direct and administer, gave him no rights of property, either over the person or goods of the minor. *Lib. i., t. 13*.

Q. 2.—Explain the nature and extent of Riparian Rights under the civil law.

A.—Under the civil law the Riparian Rights were not public; the use of the banks of a river belonged to the riparian proprietor; any one might land on the bank, discharge his freight, or tie his cable to the trees there, but he did not become proprietor of the place thus occupied for the time; nor had he the right to cut rushes or grass, or to take the fruit of the trees, for these belonged to the riparian proprietor. *Lib. ii., t. 1.*

Q. 3.—Give some prominent instances of other incorporeal rights and easements and the manner in which they were acquired under the civil law.

A.—A right of succession, of usufruct, of use, and of an obligation, are instances of incorporeal rights; though they might be, and generally were, derived out of corporeal things, *Lib. ii. t. 2*: easements, or *servitudes* are divided into two kinds—*servitudes rusticorum* and *servitudes urbanorum prædiorum*, or rural and urban servitudes; the right of drawing water, of watering or depasturing with cattle are instances of the former; and the right to pass on foot or horse back, to drive a beast of burden or a vehicle, and the right to use a way for any purpose, are instances of the latter, *Lib. ii. t. 3*. By the civil law these rights were acquired by *mancipatio*, (that is, a solemn *quasi* delivery accompanied by solemn words and gestures, before a scalesman and five witnesses, being Roman citizens,) *cessio in jure* (that is the purchaser *vindicabat*, or claimed the right in question in proper form, the seller acknowledged or did not dispute his claim, and the magistrate adjudged in favour of the claimant); *adjudicatio*, (that is. the acquiring of the right when the *judex* in a suit brought for partition of an *hereditas*, or of a thing held jointly, settled the respective rights of the parties); *lege* (that is in cases where the right was acquired by special provision of law). *Lib. ii. tt. 1, 3.*

Q. 4.—Were any and what testamentary dispositions of property admitted under the civil law?

A.—There were testamentary dispositions of property in the earliest times of Rome, which were of two sorts:—1, the testament *calatis comitiis*, which was made in an assembly of the *comitia curiata*, convoked twice a year for this purpose: 2, the testament *in procinctu*—a military testament—which was made just before an

engagement, or before setting out on an expedition, in presence of the troops in marching and fighting order : to these two was added a third, the testament *per æs et libram*. *Lib.* ii, t. 10.

Q. 5.—How were partnerships in business created ? and state the leading rules by which they were governed under the civil law.

A.—Partnerships in business were created by the parties agreeing to put their goods or industry into a common fund, in order to share the resulting profits and losses ; *Lib.* iii, t. 25. The leading rules are, 1, if the partners agreed as to the share of each, the agreement was the standard ; 2, if the share in the profits was fixed, and nothing was said of the loss, or *vice versa*, the amount fixed for the one determined that of the other ; 3, if there was no agreement each of the partners had an equal share in the profits and losses ; *Lib.* iii, t. 25.

Q. 6.—To what persons were curators appointed ; and by whom was the appointment of a curator made ?

A.—Curators when appointed to, 1, *impuberes*, whose tutors were unfit for their duty, or who had been excused for a time from the *tutela* ; for if a person had one tutor, he could not have a second ; 2, *adolescentes* (*puberes* and under twenty-five) ; 3, *furiosi* and *prodigi* (spendthrifts under interdict, though above twenty-five) ; 4, lunatics and persons suffering under incurable disease ; 5, or deaf and dumb. The curators were, in the case of lunatics and spendthrifts, appointed by the *agnati* through the authority vested in them by the twelve tables ; in other cases by those magistrates who named the tutors. *Lib.* i, t. 23.

Q. 7.—What were servitudes ; mention some of the principal real servitudes : how were they created ?

A.—Servitudes were burdens affecting property and rights. Some of the principal real servitudes were, the right of draining water ; of burning lime ; of taking sand from the field ; the right of way across another's land ; the right of one man to have his building supported by that of his neighbour ; the right to receive or not to receive the rain drops from a roof ; *Lib.* ii, t. 3. Servitudes were created : 1, by agreements with *quasi* delivery, or even without *quasi* delivery ; 2, by testament ; 3, by *prescriptio* or *usucapio* in case of some servitudes ; 4, by *adjudicatio* ; *Lib.* ii, t. 3.

Q. 8.—Give a definition of the right of "usufruct" in the civil

law. How was an "usufruct" created? How determined; and what things could have been made the subject of this right?

A.—The right of usufruct was the right of using (*usus*,) and enjoying (*fructus*,) the thing of another, without altering the substance thereof. An usufruct was created by testament, by *cessio in jure*, and by *adjudicatio* in suits for partition; but in later times, under the same law, a usufruct was created, 1, by testament; 2, by facts followed by *quasi* delivery; or by preserving the usufruct of a thing when it was alienated by delivery; 3, by the adjudication of a *judex* in suits for partition; 4, directly by the law, in certain cases. An usufruct was determined, 1, by the death of the usufructuary, or by his *diminutio capitis*; 2, by non-user (*non utendo*); 3, by assignment to the person having the bare property; 4, by *consolidatio*; 5, by changes in the substance of the thing: unlike the case of servitudes (proper), there might be a usufruct not only in lands and buildings, but also in beasts, slaves, and other moveables. *Lib. ii. t. 4.*

Q. 9.—What was the enactment of the Falcidian Law?

A.—The enactment of the *Lex Falcidia* (A. U. C 714), was:—that a testator was prohibited from bequeathing in legacies more than three-fourths of the *hæreditas*, so that the *hæredes* together, whatever their number (*sine unus hæres sit, sine plures*), should have one-fourth of the testator's goods; this reserve sum was called after the law which created it, *quarta falcidia*, or the falcidian fourth. *Lib. ii. t. 22.*

Q. 10.—On what ground could a "*donatio inter vivos*," after it had been completed, have been revoked by the donor?

A.—On the ground of ingratitude; as when the donee has been guilty of maltreating or seriously injuring the donor, when he has done any considerable damage to the donor's goods, or has failed to perform the conditions imposed upon him; in such cases the right belonged exclusively to the donor who could exercise it only during the life of the donee; nor did it descend to the donor's *hæredes*. *Lib. ii. t. 7.*

Q. 11.—Where several "*fide jussores*," or sureties, were bound each for the whole debt, could the creditor enforce the payment of the whole from any one? If one of several "*fide jussores*" so bound for the whole debt, voluntarily paid the whole, could he

enforce contribution from his co-sureties? Give reasons for your answer.

A.—The old law held each liable for the whole debt, and he had no claim for contribution against the others; so the creditor might choose any one of the sureties, and might sue him for the whole: but the strictness of the old law was relaxed by various privileges in favor of sureties; these privileges were, that the surety against whom the creditor sought an action, might require the *prætor* in granting one against him, not to grant it for the whole debt, but only for a portion, so as to compel the creditor to sue each of the sureties for their portions respectively; and if one of several sureties so bound for the whole debt, voluntarily paid the whole, he could not enforce contribution against his co-sureties, unless he, before paying, required the creditor to assign to him his actions, either for the purpose of compelling his co-sureties to refund to him the shares respectively due by them, or to enforce payment from the principal debtor. *Lib. iii., t. 20.*

Q. 12.—What was “novation?”

A.—Novation consisted in substituting a new obligation, either natural or civil, for an original liability; it operated by means of a stipulation, concluded to the intent that it should be substituted for an existing obligation; and since the fact of this intention was a matter to be proved by presumptions more or less conclusive, Justinian decreed that such intention should be formally expressed, and that, if not, the stipulation should create a new obligation without extinguishing the original one. *Lib. iii., t. 29.*

Q. 13.—Was a contract of sale, by which it was agreed that the price should be fixed by a third person, good in civil law; and what was the consequence if the person to whom the question of price was referred, refused or became unable to fix it?

A.—The contract of sale was good; the price must be fixed, for an agreement would not bind if one party was free to determine the sum to be paid or received; but the obligation was not the less an obligation when the price was left to the arbitration of a third party, though it were a conditional one; for the sale was complete if the third party made his award; it was void if he could not or would not do so. *Lib. iii., t. 23.*

Q. 14.—Could a mandatory or agent, after having accepted the office, renounce the performance of the duty delegated to him?

A.—He must renounce before the commission was executed. If he died, the performance would be renounced for the future from the time of such death. *Lib. iii., t. 27.*

Q. 15.—Give a definition of the legal term "obligation" as used in the civil law.

A.—By the civil law, an obligation is a legal tie binding a man personally, by such means as the civil law affords, to the necessity of furnishing some thing. *Lib. iii., t. 13.*

Q. 16.—How were contracts divided in the civil law, with reference to the manner of their creation?

A.—Into four; for they arose by the delivery of some thing (*re*); by solemn words (*verbis*); by writing (*litteris*); or by mere consent (*consensu*); hence contracts were real, verbal, written, and consensual; *Lib. iii., t. 13.*

Q. 17.—Give an instance of a contract created "*verbis*."

A.—The following are instances of contracts created *verbis*: where a freedman bound himself by oath to do certain services for his patron; also, where a wife and her paternal ancestors bound themselves by *dictio dotis* to give the *dos* to the husband; *Lib. iii., t. 15.*

Q. 18.—Give definitions of the contracts of "*mutuum*" and "*commodatum*," and explain the distinction between them.

A.—*Mutuum* is the contract by which one contractor gives to the other a certain quantity of things, estimated in weight, number, or measure, such other party being bound to return an equal quantity of the same species and quality; and *commodatum* is a contract in which one party lends another a thing, to be used by him gratis, the borrower undertaking to restore it after it has served his purpose. The distinction is,—in case of *mutuum*, the property in the thing was transferred to the borrower; in case of *commodatum*, the delivery of the thing to the borrower vested neither the whole property, nor even such part thereof as the right of use sometimes implied; the borrower had a mere license, an authority to use it: in case of *mutuum*, the borrower might give back one thing for another; in case of *commodatum*, he was bound to give back the very same thing he had received. *Lib. iii., t. 14.*

Q. 19.—What was essential to make the contract of sale complete in the civil law?

A.—It was complete whenever the parties had agreed as to the

thing and the price, though the thing had not been delivered, nor the price paid. After Justinian's time, if, during the treaty for sale, it was intended that the terms of sale should be drawn up in writing, the contract was not complete until such instrument was regularly prepared; till then there was no sale, and either party might change his mind, and withdraw with impunity. *Lib. iii., t. 23.*

Q. 20.—In what manner was the contract of mandate (*mandatum*) formed?

A.—The contract of mandate was formed by one person undertaking gratuitously and from motives of kindness, an honourable and lawful commission for another, *Lib. iii., t. 26.*

Q. 21.—Distinguish between "*obligatio ex contractu*," and "*obligatio quasi ex contractu*;" and give examples of each.

A.—The leading distinction between obligations *ex contractu* and those *ex quasi contractu* is, that in the former a person bound himself to another, in the latter he placed himself in such circumstances that he was thereby bound to another: for example,—if a person took upon himself the management of his neighbour's affairs, to become tutor, to have things in common with others who were yet not his partners, to accept an inheritance, or to receive money not due to him, the mere fact of such person so conducting himself imposed on him certain duties which the law would force him to fulfil; but if such person made an express agreement in any of these cases, he would then be bound by the agreement, and not by the circumstances of his position; it is only in the absence of any agreement that a person would be bound by an *obligatio quasi ex contractu*; *Lib. iii., t. 27.*

Q. 22.—What was the "*lex Aquilia*?" Was it in any, and if so in what manner, affected by the "*lex Cornelia*?"

A.—The Aquilian law (A. U. C. 468) established the *actio* called *Legis Aquilæ*, or *damni injuria*, because it awarded punishment for damage wrongfully caused: the provisions of this law contained three heads; 1, that any one who wrongfully killed another's slave, or a four-footed beast, amongst those called *pecus*, should be condemned to pay the proprietor a sum equal to the highest price which the thing had reached during the year preceding; 2, it gave an action against the *adstipulator*, who in order to defraud the person to whom the promise had been made, released

the debt to the promissor, discharging by *acceptilatio*; this second head was practically unknown in Justinian's time, who rendered *condempnationes* useless; 3, it gave an action for all kinds of damage other than those specified in the two first heads; thus if a slave or beast of the class *pecus* were wounded, or if any four-footed beast, not being of the class of *pecus*, as a dog or a wild beast, were wounded or killed, this third head gave an action. By the *lex Cornelia*, a person who injured the slave of another might be prosecuted both civilly and criminally. *Lib. iv., t. 4.*

Q. 23.—Distinguish between the right of use, and of usufruct.

A.—The distinction is,—the use was the right to make use of a thing belonging to another, but not to enjoy the fruits thereof (*sine fructu*), *Lib. ii., t. 5*; the usufruct was the right of using (*usus*), and of enjoying (*fructus*) the thing of another, *Lib. ii., t. 5.*

Q. 24.—Explain the term "*familia*."

A.—The term *familia* meant the collective body of persons who lived in one house, and under one head or manager. By the civil law every person was either the head, or subject to the head of a *familia*. *Lib. i. t. 8.*

Q. 25.—Translate *Lib. iv., t. 6, sec. 1*, and give explanatory notes upon the legal terms used therein.

A.—"*Omnium actionum quibus inter aliquos apud iudices arbitror de quacumque re queritur, summa divisio in duo genera deducitur: aut enim in rem sunt, aut in personam. Namque agit unusquisque aut cum eo qui ei obligatus est vel ex contractu vel ex maleficio, quo casu prodita sunt actiones in personam, per quas intendit adversarium ei dare facere oportere, et aliis quibusdam modis; aut cum eo agit qui nullo jure ei obligatus est, movet tamen alicui de aliqua re controversiam, quo casu prodita actiones in rem sunt; veluti si rem corporalem possideat quis, quam Titius suam esse affirmet et possessor dominum se esse dicat; nam si Titius suam esse intendat, in rem actio est.*"

"The grand division of all actions by which a complaint is made concerning some matter between any parties before judges or arbitrators, is reduced to two kinds,—for actions are either real (*in rem*) or personal (*in personam*.) For one person sues another who is liable to him either on contract or for a tort, in which case personal actions are brought, by which he contends that his adversary ought to give to, or do something for him, or makes some other

similar allegation ; or else he sues a person who is not liable to him by any obligation, but with whom he has a controversy respecting some [corporeal] thing (*res*), in which case real actions are brought, as if any one is in possession of some corporeal thing, which Titius maintains to be his, and the possessor says that he himself is the proprietor ; for if Titius maintains that it is his, the action is real."

Actio is the proceeding by which a person recovers at law compensation for an injury done by him to another, or for breach of a contract. An action *in rem* is where the gist of the action is the thing or subject matter in respect of which it is brought ; an action *in personam* is where the action is directed against the person of the defendant, and pecuniary damages are required from him. An action *ex contractu* is one founded upon a contract ; *ex maleficio* upon a wrong or tort.

Q. 26.—What was the jurisdiction of the *prætor* with respect to *damnum infectum* ?

A.—The *prætor* had jurisdiction with respect to *damnum infectum* (imminent danger), in cases where the proprietor of something dangerously defective, *e. g.*, an insecure house, was obliged by the *prætor* to guarantee his neighbour against the damage wherewith he was threatened ; if the proprietor refused to undertake this liability, the *prætor* put the demandant in possession of the house ; *Lib. iii., t. 18.*

Q. 27.—Classify servitudes.

A.—Servitudes are divided into *rural* servitudes, all those connected with the soil ; and *urban* servitudes, all those having a necessary connection with buildings ; *Lib. ii., t. 3.*

Q. 28.—What is the *capitas diminutio*, and how may it arise ?

A.—It is the loss of one of the three elements which constitute the *status* of a Roman citizen, namely, liberty, citizenship, and family. It arose, 1, when a citizen lost his liberty, (*maxima d. c.*) the loss of which involved the other two, citizenship and family ; 2, where a citizen lost his citizenship but retained his liberty, (*media d. c.*) as when a man was forbidden fire and water ; 3, when a citizen changed his family, but retained his liberty and citizenship, (*minima d. c.*). *Lib. i., t. 16.*

Q. 29.—Explain *addictio*, *arrogatio*, *interdictio*, *exceptio*, *depositum*, *delegatio*, *peculium*.

A.—By the twelve tables the *addictio* was the means by which the insolvent debtor was made a slave, and compelled to work for his creditor until the debt was discharged; *Lib. i., t. 3*; *arrogatio* (adoption) was the act by which a citizen acquired the *patria potestas*, through the mere effect of the civil law, apart from any tie of blood, by which the *arrogatus* himself, and all natural and adopted children, then under his power, became subject to the *arrogator*, *Lib. i., t. 11*; *interdictio* was where, under certain circumstances, when it was required to prevent conflicts, and to repress acts of violence, and especially in disputes as to possession of things corporeal, or the *quasi-potestas* of things incorporeal, the *prætor* instead of granting an action made an order of command or prohibition, which the parties were required to obey, *Lib. iv., t. 15*; *exceptio* was an equitable restriction introduced by the *prætor*, upon the general order to condemn given to the *judex* by the action, and was so called because it excepted or wrote away from the effect of the action, *Lib. iv., t. 18*; *depositum* was a contract in which one man (*depositarius*) received the thing belonging to another, which he was to keep gratis, and to restore at the will of the depositor, *Lib. iii., t. 14*; *delegatio* was the assignment of a debt to another, as when the debtor transferred to another person the obligation to pay, or a creditor made over to a third person the right to receive the payment, *Lib. iii., t. 29*; and *peculium* was a portion of goods distinct from the common patrimony; particular goods, *bona peculiarum*, *Lib. ii., t. 9*.

Q. 30.—Give an outline of the Roman law treated of in the Institutes.

A.—The institutes treat, 1, of the nature, divisions and the sources of law; 2, of persons, and their rights and duties; 3, of things (*res*); 4, of successions to deceased persons; 5, of obligations; and 6, of actions.

STORY ON THE CONFLICT OF LAWS.

Question 1.—What is the law of Scotland as to the *status* of one not born in wedlock, by the subsequent intermarriage of the parents?

Answer.—By the law of Scotland illegitimate children, upon the subsequent marriage of the parents, become legitimate, § 87.

Q. 2.—What is the law of this country in such a case? and is there any diversity in its application as to personalty or realty situate here?

A.—By the law of this country marriage of the parents does not legitimatise a child born before marriage, § 87. In the succession to realty the *lex loci situs* is to govern as to capacity and heirship,—as to personalty, the *lex domicilii*, §§ 98 f, 93 h, 481 a.

Q. 3.—If one in a foreign country hired himself to pay money or to do any other act in this country, by which law will such contract be governed?

A.—Where a contract is expressly or tacitly to be performed in any place other than the place where it is made, the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance, § 280.

Q. 4.—If a note be endorsed in blank, when, by the law of the country where such endorsement was made, it should have been in a special form, and it be sued upon in a country where a blank endorsement is sufficient, by which law will the endorsement be governed?

A.—A negotiable instrument is to be governed, as to its form and solemnities, by the *lex loci contractus*,—in such case, therefore, the endorsement must be in the special form, § 318; see *Trimby v. Vignier*, 1 Bing. N. C. 151; 4 M. & Scott, 695.

Q. 5.—What would be the effect of a contract made by a Canadian, in a country permitting it, to raise funds for Russia to prosecute a war with the mother country, if sued upon here?

A.—Such a contract would be held utterly void, whatever might be its validity in the country where it is made, as being inconsistent with the public policy of our country, § 259.

Q. 6.—What law is applicable in determining the nature, obligation, and interpretation of a contract?

A.—The law of the place where the contract is made,—*locus contractus regit actum*, § 263.

Q. 7.—If a sale of goods were made in a country where a warranty was annexed to the sale, and an action on the warranty was brought in a country where no such warranty was annexed, by which law would the question be determined?

A.—Where a contract is made in a country where a warranty is

implied, to be performed in a country where there is no such implication, the question is determined by the law of the place of performance, and no warranty will be implied; for where a contract is in the intention of the parties to be performed in a country other than the place where it is made, the law of that country governs the nature, obligation, and interpretation of the contract; §§ 264, 280; but if performance in another country is not contemplated, the *lex loci contractus* will govern, and the warranty will be implied, § 264.

Q. 8.—If a verbal contract for the sale or purchase of land lying here were made in a country where by the law of that country a sale or purchase of land might be verbally made, could it be enforced here? State why, or why not.

A.—It could not be enforced here, as all real contracts must be governed by the *lex rei sitæ*, and such contract is void by our law, (Statute of Frauds, 29 Car. II., c. 3.) §§ 363, 364.

Q. 9.—By what law is the liability of an acceptor of a bill of exchange determined?

A.—By the *lex loci contractus*, § 263. Byles on bills, 316.

Q. 10.—What law governs the rate of interest?

A.—Interest, as a general rule, is to be paid on contracts according to the law of the place where they are to be performed, § 291.

Q. 11.—Give a definition of the term "domicil;" and state some of the principal rules to be applied in determining the question of domicil?

A.—By the word "domicil," in its ordinary acceptation, is meant the place where a person lives or has his home; in this sense the place where a person has his actual residence, inhabitancy or commorancy, is sometimes called his domicil. In a strict and legal sense, that is properly the domicil of a person where he has his true, fixed and permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning. § 41. The following are the principal rules applicable in determining the question of domicil;—1, the place of birth of a person is considered as his domicil, if it is at the time of his birth the domicil of his parents, and this is called the domicil of birth or nativity; if the parents are then on a visit or on a journey, the home of the parents (at least if it be in the same country)

will be deemed the domicile of birth or nativity ; 2, the domicile of birth of minors continues until they have obtained a new domicile ; 3, minors are generally deemed incapable of changing their domicile during their minority ; but if the parents change their domicile, that of the minor follows it ; 4, a married woman follows the domicile of her husband ; 5, a widow retains the domicile of her deceased husband, until she obtains another domicile ; 6, the place where a person lives is taken *primâ facie* to be his domicile ; 7, where a person of full age removes to another place with an intention of making it his permanent residence, it becomes instantaneously his domicile ; 8, where a person removes to a place with an intention of remaining there for an indefinite time, and as a fixed place of present domicile, it is to be deemed his place of domicile, though he may intend to return at some future period ; 9, the place where a married man's family resides is ordinarily deemed his domicile ; 10, if a married man has his family fixed in one place, and does his business in another, the former is his domicile ; 11, where a married man has two places of residence at different times of the year, that is his domicile which he himself considers to be his home, or which appears to be the centre of his affairs, or where he votes or exercises the rights and duties of a citizen ; 12, the domicile of an unmarried man is generally the place where he transacts his business, exercises his profession, or assumes and exercises municipal duties and privileges ; 13, residence in a place must be voluntary, to produce a change of domicile ; 14, to produce a change of domicile there must be an actual removal and an intention to acquire a new domicile ; 15, presumptions from mere circumstances will not prevail against positive facts which fix the domicile ; 16, a domicile remains till a new one be acquired ; 17, if a man has acquired a new domicile, different from that of his birth, and he removes from it with an intention of resuming his native domicile, the latter is re-acquired the moment the other is given up. §§ 46, 47.

Q. 12.—By what law is the validity of a will of personalty to be determined where the property bequeathed is situate in one country, the domicile of the testator being in a different country, whilst the will is made in a third ?

A.—The validity of the will must be governed by the law of the place where made, §§ 467, 471.

Q. 13.—What is essential to make a foreign judgment an estop-

pel by the law of England? Give a short outline of the law of estoppel by foreign judgment.

A.—The judgment must have been obtained *bonâ fide*, and without fraud, and it must appear that the proceedings upon which it is founded are regular, and that the parties interested have had an opportunity to appear and defend their interests, § 592; and the court by whom the judgment was given, must have had jurisdiction; § 593.

[As to the latter part of the question, see answer to Q. 29.]

Q. 14.—Supposing a debt, not transferable by the law of Upper Canada, is contracted in a foreign country, and there assigned over by the creditor to a third person, who by the law of the foreign country, could maintain an action as assignee in his own name,—who would be the proper person to sue in Upper Canada for the recovery of the debt?

A.—The assignee may sue; for the endorsement in the place where it is made creates a direct contract between the debtor and the endorsee, and that contract should be enforceable between them every where, §§ 354, 355, 566; see *Trimbey v. Vignier*, 1 Bing. N. C. 159; *O'Callaghan v. Thomond*, 3 Taunt. 82.

Q. 15.—Would a child born before marriage in Scotland, whose parents afterwards intermarried, be considered legitimate in England? Give your reasons; and state how far the law of England is governed in cases of legitimacy by the law of the country where the birth takes place.

A.—He would not; for though a marriage, valid by a foreign local law, is held good every where, yet it does not follow that all the consequences of such marriage by such foreign local law are to be adopted, § 87; *Doe d. Birthwhistle v. Vardell*, 5 B. & C. 438; S. C. 9 Bligh, 32-88. The law of foreign countries as to legitimacy is so far respected in England, that a person, illegitimate by the law of his domicile of birth, will be held illegitimate in England, § 87 *a*.

Q. 16.—Are there any, and if so, what exceptions to the rule, that a marriage is valid in England when valid according to the laws of the country where it was celebrated?

A.—The exceptions are; 1, marriages involving polygamy or incest; 2, those positively prohibited by the law of England, from motives of policy; and 3, those celebrated in foreign coun-

tries by English subjects under special circumstances entitling them to the benefit of the laws of their own country ; §§ 113 *et seq.*

Q. 17.—If a debt contracted in England be there barred by the Statute of Limitations, can the creditor recover it in this country ? Give your reasons.

A.—The limitations of actions, as affecting the remedy and not the contract, are governed by the *lex fori*, or law of the country where the action is brought ; a foreign statute of limitations, therefore, is no defence to an action on a foreign debt in our courts, unless it have the effect of extinguishing the contract, and the parties are living in the foreign country at the time of the extinction ; §§ 576 *et seq.*, 582. *Huber v. Steiner*, 2 Bing. N. C. 202.

Q. 18.—If one enter into a contract in a foreign country to pay money, or to do any other act in this, which contract is void by the law of the foreign country, but valid here, by which law is its validity to be determined in our courts ?

A.—Where a contract is made in one country to be performed in another, its validity is determined by the law of that in which it is to be performed ; § 280.

Q. 19.—Can an action be maintained here on a contract void under the Statute of Frauds, but made and to be performed in a foreign country, by the law of which it is valid ? Give reasons for your answer.

A.—It may ; for the validity of a contract is governed by the place where it is to be performed, §§ 280, 262.

Q. 20.—By what law is the succession to the movable estate of an intestate to be regulated, where the intestate's domicile is in one country, and the movable property in another ? Give reasons for your answer.

A.—The succession to personal property is governed by the law of the actual domicile of the intestate at the time of his death ; because movables have no *situs*, and accompany the person of the owner ; §§ 481, 481 *b.*

Q. 21.—If a testator domiciled in Scotland, but seised of real estate in this country, make a will in Scotland disposing of his lands here, upon what law would the construction of the will depend ? Give reasons for your answer.

A.—The interpretation of the will must be according to the *lex domicilii*, unless it can be clearly gathered from the terms used in

the will, that the testator had in view the law of the place of the *situs* : for it is to be presumed *primâ facie* that he was acquainted only with the law of his domicil, but if he use terms clearly applicable to the law of the *situs*, that presumption must fail ; 479 *h.*

Q. 22.—What is meant by the *lex loci contractus*, *lex fori*, *lex loci solutionis* ; and when do they respectively apply ?

A.—The *lex loci contractus* is the law of the country in which a contract is made ; it governs the validity, nature, obligation and interpretation of the contract, (unless the contract is to be performed in another country,) and the proofs by which it is to be authenticated ; §§ 242, 260, 263. The *lex fori* is the law of the place where an action is brought upon a contract ; by it is regulated the remedy for breach of the contract ; § 556. The *lex loci solutionis* is the law of the place where a contract is to be performed or paid ; this governs the validity, nature, obligation, and interpretation of the contract ; § 280.

Q. 23.—What two things are necessary for the acquisition of a domicil ? Is residence necessary for retaining a domicil once acquired.

A.—Two things are necessary to constitute domicil,—residence, and the intention of making it the home of the party, § 44. A domicil once acquired remains until a new one is acquired, § 47.

Q. 24.—By the law of what country is the descent of real property governed ?

A.—The descent and heirship of real esate is exclusively governed by the law of the country within which it is situate, § 483.

Q. 25.—Can the same person be in any way liable to the criminal laws of two countries at the same time ? If so, how ?

A.—The laws of a country bind all persons within its territory, whether natural born subjects or aliens, § 18 ; but the subjects of a state may, though in a foreign country, be bound by the laws of their native country, § 21.

Q. 26.—How is the capacity of a person affected by change of domicil ?

Upon change of domicil the capacity or incapacity of the person is regulated by the law of the new domicil, § 69.

Q. 27.—Upon what principles are the laws of one country recognized by another ? Illustrate by reference to bankruptcy, and laws of a similar character.

A.—Upon the principle that the rejection of the laws of a foreign nation may, in many cases, work less injustice, than the enforcement of them will remedy, § 34. Thus if the bankrupt laws of one state are not recognized by another, the transfer of ownership in the bankrupt property could not be recognized, and a manifest injustice might ensue, §§ 403, 404.

Q. 28.—Show how the *lex loci actûs* or *contractûs* is to be considered with respect to the disposition of movable and immovable property, situate within another state or jurisdiction?

A.—The *lex loci actûs* or *contractûs* governs the disposition of immovables, § 368; but does not affect the disposition of movable property, which is governed by the *lex loci rei sitæ*, § 384.

Q. 29.—What is the effect of a foreign probate and administration upon assets in this country?

A.—Foreign probate and administration is not recognized in this country; the executor or administrator therefore must obtain probate or letters of administration from our courts before dealing with assets in this country; § 513. See *Pipon v. Pipon*, Amb. 25; *Price v. Dewhurst*, 4 My. & Cr. 76.

Q. 30.—What force and effect has a foreign judgment (*exceptio rei judicatæ*)? and give the opinion of different jurists upon this question?

A.—In matters relating to immovable property the judgment of the *forum rei sitæ* is held absolutely conclusive; a judgment in any foreign country touching such property, will be held of no obligation; § 591. A judgment *in rem* against movable property within the jurisdiction of the court pronouncing the judgment, will be held conclusive not only *in rem*, but also as to all the points and facts which it professedly or incidentally decides, § 593. As regards a foreign judgment *in personam*, where it is sought to be enforced, it is not considered conclusive,—where it is set up in bar of a suit by way of defence, it is held conclusive, § 598. [For the opinions of the different jurists given by Mr. Story, we must refer the student to §§ 584 *et seq.*, as they are too voluminous to be transcribed.]

TAYLOR ON EVIDENCE.

Question 1.—What are the four general rules which govern the production of evidence to prove a case?

Answer.—1, The evidence must correspond with the allegations; but it is sufficient if the substance only of the issues be proved. 2, The evidence must be confined to the points in issue. 3, The burden of proving a proposition at issue lies on the party holding the substantial affirmative. 4, The best evidence of which the case in its nature is susceptible, must always be produced. § 172.

Q. 2.—What are the meaning and object of the rule which requires the production of the best evidence, of which the case is susceptible?

A.—It means that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence is attainable. The rule does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when better evidence is withheld, it is only fair to presume that the party has some sinister motive for not producing it, and that, if offered, his design would be frustrated. § 363.

Q. 3.—What is the most general classification of evidence? and define each class.

A.—Evidence is divided into two classes, *primary* and *secondary*. Primary evidence is the best evidence of which the case is in its nature susceptible, or in other words, that kind of proof which, in the eye of the law, affords the greatest certainty of the fact in question: all evidence falling short of this in its degree, is termed secondary. The distinction between them is one of law and not of fact; referring only to the quality and not to the strength of the proof: evidence which carries on its face no indication that better remains behind, is not secondary but primary. § 365.

Q. 4.—When is a party at liberty to have recourse to secondary evidence?

A.—When it is shewn that the production of primary evidence is out of the party's power, § 398. With respect to documents, proof of their contents may be established by secondary evidence,

first, when the original writing is destroyed or lost ; secondly, when its production is physically impossible, or at least highly inconvenient ; thirdly, when the document is in the possession of the adverse party, who refuses after notice, and in some cases without notice, to produce it ; fourthly, when it is in the hands of a third party, who is not compellable by law to produce it, and who being called as a witness with a *subpoena duces tecum* relies upon his right to withhold it ; fifthly, when the law raises a strong presumption in favour of the existence of the document ; sixthly, when the papers are voluminous, and it is only necessary to prove their general results ; and lastly, when the question arises upon the examination of a witness upon the *voir dire* ; § 398. With respect to secondary evidence of oral testimony, where a witness duly sworn has given his testimony in a judicial proceeding, to the authority of which the party against whom the testimony is offered was legally bound to submit, and in which he has the power to cross-examine (whether he has exercised that power or not), the testimony so given, will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties or those claiming under them, provided it relate to the same subject, or substantially involve the same material questions ; § 434.

Q. 5.—If it be necessary to prove the receipt of moneys by a public officer, a collector for instance (who is not a party to the cause), in how many ways may the fact be proved, if the collector be living ? and if he be dead, how may the same fact be proved ? And state the qualifications or *quasi* exception to the rule requiring the best evidence, upon which the latter part of the case put rests.

A.—If he be living, the fact may be proved by calling either the collector himself, or the parties who paid him, both these proofs being equally primary : if he be dead, the only primary evidence is the testimony of the persons from whom the moneys were received ; but the law does not require the production of these persons, but on proof of the collector's death, will admit any entries in his book acknowledging the receipt, though such entries are merely secondary evidence,—and if the book be in the hands of the opposite party, who, after notice, refuses to produce it, even secondary evidence of its contents will be admissible ; § 366.

Q. 6.—If the subscribing witnesses to the execution of a deed be dead, how is the deed proved ?

A.—It is sufficient if the signature of the witness be proved ;
§ 1649.

Q. 7.—What is the proper mode of proving a deed to which there are two attesting witnesses, of whom one is dead and the other living? And upon what ground does the distinction rest between this case and that contained in the latter part of question 5?

A.—The proper mode of proving the deed is to call the witness who is living; for proof of the signature of the one who is dead, would merely raise a *presumption* that the deceased had witnessed all which the law requires for the due execution of the instrument, whereas the surviving witness would be able to give *direct proof*, § 363. The distinction between this case and that put in the latter part of question 5, rests on this, that the attesting witnesses are either rendered necessary by statute, or have been solemnly chosen by the parties as the persons on whose united testimony they wish to rely, and consequently, so long as one of them can be called, secondary evidence respecting the other cannot be admitted, § 366.

Q. 8.—What are the divisions of presumptive evidence?

A.—The general head of presumptive evidence is divided into two branches,—presumptions of law and presumptions of fact, of which the former class are divided into conclusive and disputable presumptions, § 61.

Q. 9.—Explain what is meant by conclusive, or absolute, and disputable presumptions of law; and explain upon what principles they rest; and give some examples of each.

A.—Conclusive or absolute presumptions of law, are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise, § 62; disputable presumptions are those which may be overcome by opposing proof, § 95. These presumptions are founded either upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things; so where one fact is proved and ascertained, the other, its uniform concomitant, is universally and safely presumed; thus a malicious attempt to kill may be presumed from the deliberate use of a deadly weapon, § 61. For examples of conclusive presumptions,—where one has been in possession of land for the

time mentioned in the statutes of limitations, under a claim of absolute title and ownership, a conclusive presumption will be raised against all persons but the Sovereign, of a valid grant, § 65: every sane person, above the age of fourteen, is conclusively presumed to be acquainted with the law of the land,—“*ignorantia juris, quod quisque tenetur scire, neminem excusat*,” § 68: where one has solemnly admitted a fact, it is, as against him, conclusively presumed to be true, and he is estopped from afterwards denying it, § 76. For examples of disputable presumptions,—as men do not generally violate the penal code, the law presumes every man to be innocent; but as some do transgress it, evidence is received to repel the presumption, § 96; as men seldom do unlawful acts with innocent intentions, the law presumes every act, in itself unlawful, to have been wrongfully intended, till the contrary appears,—thus, on a charge of murder, malice is presumed from the fact of killing, but the presumption may be rebutted by proof of want of malice, § 103: as men generally own the property they possess, proof of possession is presumptive proof of ownership, § 108.

Q. 10.—When a person is once proved to have been living, for what period, by the law of England, will the presumption of his being alive continue? When, by the civil law, did the presumption cease? And what is the law of Scotland on the subject?

A.—Where a person is once shewn to have been living, the law, in the absence of proof that he has not been heard of within the last seven years, will in general presume that he is still alive, unless after a lapse of time considerably exceeding the ordinary duration of human life; but no definite period has been conclusively fixed during which the presumption is to prevail. In the civil law the legal presumption of life ceases at the expiration of one hundred years from the date of the birth; and the same rule prevails in Scotland. § 156.

Q. 11.—After what lapse of time will the presumption of life cease, if proof be given of the person's continued absence from home, and of the non-receipt of intelligence after due inquiry?

A.—In such case the presumption of life ceases after the lapse of seven years, § 157.

Q. 12.—In the case of a father and son perishing in the same wreck, battle or conflagration, and the circumstances of their deaths are unknown, does the law of England make any presumption of sur-

vivorship? And in such case what was the presumption of the Roman law? and what of the French code? What cases on this subject in English law are referred to by Mr. Taylor?

A.—In cases of this nature the law of England recognises no presumption of survivorship; but where the circumstances of their deaths are unknown, the matter will be treated as if both had perished at the same moment, § 160. Mr. Taylor refers on this subject to *R. v. Hay*, 1 W. Bl. 640; *Underwood v. Wing*, 19 Beav. 459, per Romilly, M. R., affirmed on appeal, 4 De Gex, M. & G. 1; *Mason v. Mason*, 1 Meriv. 308; *Wright v. Netherwood*, 2 Salk. 593, n. a; 2 Phill. Ec. R. 266—277, n. c. In such case the Roman law presumed that the son died first if he was under the age of puberty, but if he was above that age, that he was the survivor, upon the principle that in the former case the elder is generally the more robust, and in the latter, the younger, § 159. The French code, if the father were above the age of sixty and the son under the age of fifteen, presumes the father to have been the survivor; if they were both between those ages, the presumption is in favour of the survivorship of the son, § 159.

Q. 13.—What is the distinction between legal presumptions and rules of construction? What instance does Mr. Taylor give to illustrate the difference?

A.—Legal presumptions may be rebutted, and if rebutted, supported also by parol testimony; but no evidence can be received on either side, if the court by construction can arrive at a conclusion respecting the meaning of the instrument; § 1113. Mr. Taylor illustrates the difference by giving as an instance the rule of construction which awards to a stranger legatee as many legacies as are bequeathed to him by separate instruments, unless the instruments themselves contain intrinsic evidence that the legacies were not intended to be cumulative, or unless the double coincidence of the same amounts and the same expressed motives appearing in each instrument, induces the court to presume that repetition, and not accumulation was intended; extrinsic evidence cannot be received to impugn this rule, for to admit it would be to construe a writing by parol evidence.

Q. 14.—Is it necessary in order to prove a deed to call a subscribing witness?

A.—Formerly it was necessary to call the subscribing witness to

prove a deed, but by Imp. Stat. 17 & 18 V. c. 125, s. 26 it is provided that it shall not be necessary to prove a deed by the subscribing witness, where attestation is not requisite to the validity of the deed, § 1637. [Our Stat. 19 V. c. 43, s. 163—U. C. Con. Stat. c. 22, s. 212, applies this enactment to Upper Canada.] But where the validity of the deed depends upon its formal attestation, the subscribing witness must be called, § 1641.

Q. 15.—What proof is necessary on a trial for perjury in order to convict the accused?

A.—To procure a conviction for perjury, evidence must be given amounting to something more than sufficient to counterbalance the oath of the accused, and the legal presumption of his innocence; so that the oath of a single opposing witness will not avail unless it be corroborated by material and independent circumstances; § 876.

Q. 16.—Are accomplices good witnesses? and what is the rule of law respecting the same?

A.—The testimony of accomplices is admissible. There is no positive rule of law respecting the degree of credit to be placed upon their testimony, that being a matter exclusively within the province of the jury, who may reject the evidence if it be not corroborated by other evidence, or may if they please act upon it. It is the practice with judges to advise the jury not to convict upon such evidence, without corroboration. § 887.

Q. 17.—Can a party in any case impeach his own witness? If yes, how, and in what cases?

A.—By Imp. Stat. 17 & 18 V. c. 125, s. 22, a party may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement; § 1282. [An enactment in the same words is contained in our Stat. 19 V. c. 43, s. 159—U. C. Con. St. c. 22, s. 214.]

Q. 18.—If a witness on cross-examination give an answer on a collateral point which is untrue, can you call a witness to contradict his statement?

A.—The answer of a witness on cross-examination on a collateral

point is conclusive, and a witness cannot be called to contradict his statement, § 1292.

Q. 19.—What is the necessary proof on the part of the Crown on a trial for bigamy?

A.—An actual valid marriage must be proved; proof of a ceremony which the parties suppose to be sufficient to constitute the relation of husband and wife is not enough, but it must be shewn to be sufficient according to law for that purpose; § 140.

Q. 20.—What is the evidence necessary to prove a will on a trial respecting real property?

A.—The will may be proved at law by one of the attesting witnesses, in equity by all of them, § 1652. By Imp. Stat. 20 & 21 V. c. 77, s. 62 probate is made evidence, § 1565 a.

Note.—Probate is made evidence in Upper Canada in actions respecting real estate by 22 V. c. 93, s. 33—U. C. Con. St. c. 32, s. 9.

Q. 21.—Can a married woman be witness for her husband in any and if so what cases?

A.—A married woman may, by recent imperial enactments, be a witness for her husband in civil cases, but not in criminal proceedings, §§ 1219, 1227.

Q. 22.—What is meant by impeaching a witness by general and particular evidence; and which is permitted in the case of a party seeking to impeach his own witness? What is the reason for the distinction?

A.—The former is where evidence is given reflecting on the general reputation of the witness; the latter is where evidence is given of particular facts reflecting upon his character; § 1324. By the Common Law Procedure Act, s. 22 (s. 159 of our Act—U. C. Con. Stat., c. 22, s. 214,) a party is not allowed to impeach his own witness by general evidence, but may, if in the opinion of the judge he prove adverse, contradict him by particular evidence, § 1282. The reason for the distinction between general and particular evidence is, that every man is supposed to be capable of supporting his general reputation, but it is not likely that he should be prepared, without notice, to answer the other, § 1324.

Q. 23.—What effect, as an admission, has the payment of money into court in an action of tort?

A.—Where the declaration is general and unspecific, the pay-

ment of money into court, although it admits *a* cause of action, does not admit *the* cause of action sued for; and the plaintiff must give evidence of the cause of action sued for, before he can have larger damages than the amount paid into court. If the declaration is specific, so that nothing would be due to the plaintiff from the defendant unless the defendant admitted the particular claim made by the declaration, the payment of money into court admits the cause of action sued for, and so stated in the declaration. § 765.

Q. 24.—Can the admission of a party to the record as to the contents of a written instrument in any case dispense with its production at the trial?

A.—The admission of a party to the record as to the contents of a written instrument are receivable as primary proof against himself and those claiming under him, without notice to produce the instrument, or accounting for its absence, § 381.

Q. 25.—Is an entry made by a deceased person in the ordinary course of business evidence of every thing contained in such entry?

A.—Such an entry is no evidence of collateral circumstances stated in it, § 637.

Q. 26.—Are any persons except parties to the record [or indictment,] incompetent witnesses? If so, who?

A.—The following persons, not parties to the record or indictment, are incompetent: 1, the husbands and wives of all persons, who are defendants in any criminal proceeding; 2, the wives of supposed paramours who are made respondents in suits for dissolution of marriage, or for damages by reason of adultery; 3, in cases of high treason and misprision of treason, other than such as consist in injuring or attempting to injure the Queen's person, those persons who are not included or properly described in the list of witnesses delivered to the defendant pursuant to the statute of Anne, c. 21; and 4, persons insensible to the obligations of an oath; §§ 1220, *et seq.*

Q. 27.—To what extent is hearsay of declarations by members of the family admissible in questions of pedigree? Does the remoteness of the relationship affect the admissibility of the evidence; and does the rule apply to relations by marriage?

A.—Such declarations, to be admissible in evidence, must be

made *ante litem motam*, § 563. They can only be received when made by persons *de jure* related by blood or marriage to the family in question, but the remoteness of the relationship does not affect their admissibility, §§ 571, 576.

Q. 28.—What is a latent and what a patent ambiguity in a deed ? which may be explained by parol evidence ?

A.—A patent ambiguity is that which appears to be ambiguous upon the deed ; a latent ambiguity is that which seems certain and without ambiguity, for anything that appears upon the deed, but there is some collateral matter out of the deed that breeds the ambiguity. The latter may be explained by parol evidence, the former cannot. § 1098.

Q. 29.—Give some instances of evidence excluded on the ground of public policy ?

A.—Communications between husband and wife, § 880 ; professional communications between barristers, solicitors or attorneys and their clients, § 832 ; judges, arbitrators and counsel are not compellable to give evidence upon matters in which they have been judicially or professionally engaged, § 859 ; secrets of state, § 860 ; proceedings of grand jurors, § 863 ; the evidence of petty jurors when offered to prove mistake or misconduct in the jury in regard to the verdict, § 864 ; evidence which is indecent, or offensive to public morals, or injurious to the feelings of third persons, the parties themselves having no interest in the matter, except what they have impertinently created, § 867.

Q. 30.—Are there any, and if so, what cases in which more than one witness is required ?

A.—Two witnesses are by statute necessary in treason and misprision of treason, § 869. To prove the crime of perjury the oath of one witness is insufficient ; it must be corroborated by material and independent circumstances, § 876. In cases of bastardy, a man cannot be adjudged to be the putative father of an illegitimate child on the single testimony of the mother ; her evidence must be corroborated in some material particular by other testimony, § 881. Where a material fact is directly put in issue by an answer in Chancery, it must be corroborated by additional evidence, § 883. In the Ecclesiastical Courts the testimony of a single witness is insufficient to support a decree, § 883.

Q. 31.—What is the meaning of *ante litem motam*?—does it mean a suit actually commenced?

A.—The term *lis mota* means the commencement of the controversy, and not the commencement of the suit, § 564.

Q. 32.—What amount of religious belief is necessary to render a witness competent?

A.—A witness is competent to testify, if he believes in the existence of God, and that Divine punishment will be the certain consequence of perjury; it is not material whether the witness believes that the punishment will be inflicted in this world or in the next,—it is enough if he has the religious sense of accountability to the Omniscient Being who is invoked by an oath; § 1252.

Q. 33.—What exceptions are there to the presumption that the date of a letter or other writing is correct?

A.—There are two exceptions,—the first is, where, in order to prove a petitioning creditor's debt, the assignees put in an instrument signed by the bankrupt, which bears date before the act of bankruptcy; and the second is, where, in petitions for damages on the ground of adultery, letters are put in evidence to shew the terms on which the husband and wife were living before the seduction. There is also a third exception, (though it is not a settled point,) where indorsements made by a deceased obligee on a bond, acknowledging the receipt of interest, are tendered in evidence by his assignee, with the view of defeating a plea of the Statute of Limitations, set up by the obligor. § 137.

Q. 34.—Is there any and what distinction between secondary and second-hand evidence?

A.—Secondary evidence is that which is admissible when primary evidence cannot be produced, as affording the next best proof of the fact in controversy; second-hand evidence is that which is not within the knowledge of the witness himself, but which he has obtained from the mere word of some other person, and which therefore is inadmissible, as no credit can safely be placed upon a mere assertion by a person not under oath; §§ 365, 507.

Q. 35.—Are there any cases in which a defendant is an admissible witness for his co-defendant?

A.—A defendant may be a witness for his co-defendant, except in criminal cases where the indictment is so framed as to give him

a direct interest in obtaining the discharge of his co-defendant, as in the case of a conspiracy where the concurrence of two or more individuals is necessary to constitute the offence, §§ 1217, 1223.

Q. 36.—In what cases prior to the Common Law Procedure Act was a comparison of hand-writing admissible?

A.—There were two cases in which comparison of hand-writing was allowed; the first was, where other documents, admitted to be genuine, had already been produced as evidence in the cause, the jury were allowed to compare them with the writing in dispute, § 1675; the second was, where, in order to raise an inference that a certain document had been written by a party, another immaterial document proved to be in his hand-writing was put in evidence, for the purpose of shewing that each paper contained similar specimens of peculiar spelling, § 1677.

Q. 37.—Does the fact that the issue is on the defendant in all cases entitle him to begin? If not, state any exception.

A.—It does not; where the plaintiff seeks substantial and unliquidated damages, he shall begin, though the issue be on the defendant, § 353.

Q. 38.—Where a fact in issue in the cause requires to be decided during the progress of the trial, for the purpose of rendering evidence admissible, is it a question for the court or for the jury; and is such decision final?

A.—Questions respecting the competency or admissibility of evidence are exclusively within the province of the court, and when the admissibility depends on a disputed fact, all the evidence to prove or disprove that fact must be received by the judge, and adjudicated on by him alone, §§ 2, 22. The decision is merely whether there is, *prima facie*, any reason for presenting the evidence at all to the jury, and if erroneous, it may be reviewed by the court above, § 22.

Q. 39.—If a witness give evidence which may tend to criminate him without claiming the protection of the court, is such admission admissible evidence against him? Does it make any difference if he claim the protection of the court, and is compelled to answer?

A.—Where a witness voluntarily makes a statement on his examination, such statement may be used afterwards as evidence against him, unless he be protected by the special language of some statute, § 821. But where he is compelled to answer he is

entitled to the protection of the court, and his answer should not be admitted as evidence in any future criminal proceedings against him, § 1309.

Q. 40.—What papers is an attorney justified in refusing to produce under a *subpœna duces tecum*? If he refuses and is not compelled by the judge to produce the papers asked for, can the party requiring them give secondary evidence of their contents; if not, what further steps must he take before he can do so?

A.—An attorney is justified in refusing to produce all such papers as are delivered to him professionally, or written by him in his professional capacity, § 832. If an attorney refuses to produce such papers under a *subpœna duces tecum*, the party who requires them may give secondary evidence of them; but before doing so, he should *subpœna* the client to whom the papers belong, unless the attorney swear that he refuses to produce them under instructions to that effect from his client, § 427.

Q. 41.—State some cases in which a notice to produce is not necessary for the purpose of making secondary evidence admissible?

A.—A notice to produce before giving secondary evidence is unnecessary in the following cases:—where the instrument to be proved is itself a notice, § 420; where from the nature of the action, or from the form of the pleadings, the defendant must know that he will be charged with the possession of an instrument, and be called upon to produce it, § 422; where the opposite party has obtained possession of the document fraudulently or forcibly, or where after action brought, he has received it from a witness in fraud of a *subpœna duces tecum*, § 423; in the case of an agreement between the master of a merchant ship and a seaman, the latter may give secondary evidence of its contents without giving notice to produce, § 424; where the adverse party or his attorney has admitted the loss of the document, or where the party in possession of the writing might himself give secondary evidence of its contents without producing it, § 425; where it is proved that the adverse party or his attorney has the original instrument in court, § 426.

Q. 42.—Is a witness who refuses to answer a question on the ground that it may criminate him, bound to shew how his answer would have that effect? give your reasons.

A.—He is not; for if he were required to do so, the protection

which the rule is designed to afford to the witness would be at once annihilated, § 1311.

Q. 43.—When a written receipt has been given, is oral evidence of payment admissible, and why?

A.—In such case oral evidence is admissible; for oral evidence is not excluded by the existence of written, except in the case of an instrument which the law requires to be in writing, in the case of a contract which the parties have put in writing, and in the case of a writing, the existence or contents of which are disputed, and which is material to the issue between the parties, and is not merely the memorandum of some other fact; §§ 385, 372—380.

Q. 44.—In what cases, and of what facts, is a dying declaration admissible evidence?

A.—A dying declaration is only admissible in the case of homicide where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration, § 644; and to make such declaration admissible evidence, it is essential that at the time when it was made the declarant should have been in actual danger of death, that he should then have had a full apprehension of his danger, and that death should have ensued, § 648. A dying declaration is admissible only as to matters to which the deceased would have been competent to testify, if sworn in the cause; and so must, in general be a narration of facts only, § 650.

Q. 45.—Is it necessary to object at all, and if so, to what extent, to inadmissible evidence tendered at Nisi Prius in order to be allowed to make the reception of such evidence a ground for a new trial?

A.—In moving for a new trial on the ground of the reception of inadmissible evidence, the party will not be permitted to rely on any other objections than those taken at Nisi Prius, § 1681.

Q. 46.—Mention some cases in which hearsay evidence is admissible.

A.—Hearsay evidence is admissible, 1, in cases relating to matters of public and general interest, where rights are claimed of which the origin is of so ancient a date, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature cannot be obtained (§ 544); 2, in cases relating to pedigree; 3, in those relating to ancient possession;

4, declarations against interest ; 5, declarations in the course of office or business ; and 6, dying declarations ; § 543.

Q. 47.—What is the effect, at *Nisi Prius*, of a party omitting to produce documents under a notice to produce ?

A.—If a party, having received notice to produce documents at the trial, omits to produce them, his adversary may give secondary evidence of their contents, § 410. A party declining to produce documents after notice, cannot subsequently produce and prove them as part of his own case, § 1615.

Q. 48.—Mention some cases in which parol evidence is admissible to explain, and state whether it is ever admissible to vary a written contract ?

A.—Parol evidence may be admitted to explain a written contract in the following cases ; 1, where it is written in short-hand, or characters difficult to be decyphered, or where it is written in a language which, as being foreign, obsolete, technical, local or provincial, is not understood by the court, or is capable of bearing two or more interpretations, the testimony of persons skilled in decyphering writings, or who understand the language or terms used, is admissible to explain the instrument, § 1059 ; 2, parol evidence will be received of every material fact which will enable the court to ascertain the nature and qualities of the subject matter of the instrument, or, in other words, to identify the persons and things to which it refers, § 1082. Courts of equity will receive parol evidence to vary a writing where, by some mistake of fact, it speaks a different language from what the parties intended, and where it would, consequently, be unconscientious or unjust to enforce it according to its expressed terms, § 1041. The rule excluding parol evidence to vary a written contract does not affect strangers to the instrument, who may therefore give evidence for that purpose, § 1051.

Q. 49.—What is meant by swearing a witness on the *voir dire* ? for what purpose is this done ?

A.—Where an objection is taken to the competency of a witness, he may be examined as to the facts on which the objection rests, on the *voir dire* ; being sworn to answer "all such questions as the court shall demand of him," § 1242.

Q. 50.—What is the meaning of the rule "that the best evidence of which the case is susceptible should be presented to the

jury?" Does this rule apply any, and what test for distinguishing between primary and secondary evidence?

A.—This rule does not mean that the greatest amount of evidence which can possibly be given should be required; but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party; and thus it distinguishes between primary and secondary evidence, the former being that which carries with it no indication that better evidence remains behind, the latter being such as shews that better evidence does exist; § 363—365.

Q. 51.—What will amount to such an inducement held out to an accused person as will render his confession inadmissible as evidence against him? and by whom must it have been held out to have this effect?

A.—Any promise made or advice given to the accused, relating to his escape from the charge against him is sufficient to render his confession inadmissible in evidence against him, as the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the accused, § 803; Russel on Crimes, ii. 826. The inducement must have been held out to the accused by some one having authority over him in connexion with the prosecution,—as for instance the prosecutor, or the officer in whose custody he is,—or by some one in his presence with his tacit sanction, § 797; and it has been considered by some that an inducement offered by a person having no authority would exclude the confession as evidence, but this is doubted, § 799.

Q. 52.—In what class of cases is reputation admissible evidence?

A.—Reputation is admissible to prove marriage, except in petitions for damages by reason of adultery, and in indictments for bigamy; in which cases it is received as original evidence and not as hearsay; § 517. [And see answer to Q. 47.]

Q. 53.—What is the effect of a judgment *in rem* and a judgment *inter partes*, respectively?

A.—A judgment *in rem*, when tendered in evidence, will bind all persons whomsoever; and this too, perhaps, although it has not been pleaded;—but a judgment *inter partes* will, in general, bind only parties and privies thereto; and even as against them, it will

not be regarded as absolutely conclusive evidence, unless it be specially pleaded by way of estoppel; § 1486.

Q. 54.—In what cases and against whom are depositions taken on a formal trial admissible as evidence?

A.—Where primary evidence cannot be produced, the depositions of a witness on a former trial, in which the party against whom they are used has had an opportunity of cross-examining the witness, may be given as secondary evidence against either party in a subsequent suit between the same parties, § 434 *et seq.* Depositions are receivable, like any other admission, against the deponent whenever he is a party, § 1561.

Q. 55.—What are the several functions of a judge and of a jury with regard to written instruments produced at a trial?

A.—The construction of written instruments belongs to the judge alone; but the true meaning of the words in which they are couched, and the surrounding circumstances, if any, are to be ascertained as facts by the jury; § 36. But the nature of a libelous publication is one upon which the jury must decide as a matter of fact, § 38.

Q. 56.—After how long a period will a deed prove itself? and what is the meaning of proper custody?

A.—When a deed is thirty years old it proves itself, its bare production being sufficient, §§ 74, 1643. A deed is considered to come from the proper custody when it is found in a place in which, and under the care of persons with whom it might naturally and reasonably be expected to be found, § 595.

Q. 57.—What is the effect of not pleading an estoppel when there has been an opportunity of so doing?

A.—If a party, having an opportunity of pleading an estoppel, does not avail himself of it, the court will conclusively presume that he has intended to waive all benefit derivable from the estoppel, and will leave the jury to form their own conclusion from the facts presented to them in evidence, §§ 78, 1486.

Q. 58.—Are there any degrees of secondary evidence? Shew how this necessarily arises from the distinction between primary and secondary evidence.

A.—All evidence falling short of primary evidence is in its degree termed secondary, §§ 365, 495. The distinction between primary and secondary evidence refers only to the *quality*, and not to

the *strength* of proof, and therefore evidence, of whatever strength it may be, is secondary if it carries with it an indication that better remains behind, § 365.

Q. 59.—Are there any, and if so, what cases in which parol evidence of intention is admissible to explain a written instrument?

A.—Parol evidence of intention will be receivable where extrinsic evidence has shewn that a description in the instrument is alike applicable, with legal certainty, to two or more persons or things, § 1092.

Q. 60.—Would the rule that there are no degrees of secondary evidence make a copy of a copy sufficient, in cases where secondary evidence is admissible? Give your reasons.

A.—It would not; for that rule does not make all sorts of evidence, however loose, which a party chooses to tender, admissible; and in the case put, the opponent might object that, assuming the second copy to correspond exactly with the first, the first must be produced and proved to have been compared with the original or otherwise there would be nothing to shew that the second copy and the original were identical; § 497.

Q. 61.—When, if at all, do the declarations of co-conspirators become admissible against each other?

A.—Before the declarations of a co-conspirator are receivable as evidence against the other conspirators, proof must, in general, be given sufficient, in the opinion of the judge, to establish *prima facie* the fact of conspiracy between the parties, or, at least, proper to be laid before the jury as tending to establish such fact; § 527.

Q. 62.—Upon what principle are declarations accompanying acts admissible as evidence? Is this in reality an exception to the rule rejecting hearsay evidence? Give your reasons.

A.—Declarations accompanying acts are admissible as evidence on account of their close connexion with the principal fact under investigation; and by such connexion they are distinguished from hearsay, and are admitted as original evidence; § 521.

Q. 63.—What is the rule as to the competency of witnesses, and wherein does the law of Canada differ from the law of England in this respect?

A.—In England, by recent enactments, witnesses are rendered competent in cases where the verdict or judgment in the action would be admissible as evidence for or against him; and in cases

where they were formerly excluded by reason of incapacity from crime, or interest—excepting persons under criminal charge, who are precluded from giving evidence for or against themselves, and excepting in the case of suits instituted in consequence of adultery, and actions for breach of promise of marriage; §§ 1213–1217. Our law differs from the English law in precluding parties to the record, or persons directly interested in the action, from giving evidence on their own behalf; 16 V. c. 19, s. 1—U. C. Ccn. St. c. 32, s. 5.

Q. 64.—What writings is a witness not bound to produce?

A.—A witness is not bound to produce writings in his custody, the production of which would tend to render him liable to punishment, or expose him to penalty or forfeiture, unless they be of a public nature, or such as are directed by statute to be kept and produced; § 1318.

Q. 65.—How far is a witness compelled to answer questions degrading in their nature?

A.—Where the transaction to which the witness is interrogated, forms any material part of the issue, he will be obliged to give evidence, however strongly it may reflect upon himself; but there is much doubt whether he can be compelled to answer such questions when they are not material to the issue, but only put to test his character and credit,—formerly it was considered that he could not, but later decisions tend to discountenance the privilege; §§ 1813 *et seq.*

Q. 66.—When are admissions evidence?

A.—Admissions are receivable as evidence when made by the party against whom they are tendered in evidence, or by some one identified in interest with him, § 669. They are admissible also, if made by strangers to the suit, when the issue is substantially upon their mutual rights at a particular time; § 688.

Q. 67.—Distinguish between evidence, competent evidence, and satisfactory evidence.

A.—*Evidence* includes all the legal means (exclusive of mere argument) which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation: *competent evidence* is that which the law requires as the fit and appropriate proof in the particular case; and *satisfactory evidence* is such as

ordinarily satisfies an unprejudiced mind beyond reasonable doubt ; §§ 1, 2.

Q. 68.—What exceptions are there to the rule that communications between attorney and client are privileged ?

A.—Where it appears from independent evidence that the communications were made for a criminal purpose, the attorney will be bound to disclose them, § 833.

Q. 69.—What are the rules respecting the right to begin and reply ?

A.—1. The party on whom the *onus probandi* lies, as developed on the record, must begin ; except where the defendant admits the whole *prima facie* case of the plaintiff, in which case he will be entitled to begin, provided he could not by his pleading have made this admission at an earlier period ; and except where the plaintiff seeks substantial and unliquidated damages, in which case he shall begin, though the general issue be not pleaded, and the affirmative lie on the defendant ; §§ 350, 353. 2. If the record contains several issues, and the burthen of proving any one of them lies on the plaintiff, he is entitled to begin, provided he will undertake to give evidence upon it, § 356. The person who begins has the right to reply whenever his adversary adduces evidence to the jury in support of his cause, § 361 : on the trial of public prosecutions instituted by the Crown, the law officers of the Crown have the right of reply, although no evidence be adduced on the part of the defendant, § 362. [See U. C. Con. St. c. 22, s. 209.]

Q. 70.—What are *res gestæ*, and how do they affect the admissibility of evidence ?

A.—*Res gestæ* are the matters in controversy. Declarations and acts connected with the *res gestæ* are admissible in evidence, being distinguished from mere hearsay by such connection, § 521.

Q. 71.—Explain the principles by which the evidence of "experts" is regulated.

A.—The evidence of "experts" is admitted in questions of science or trade ; where from the difficulty or impossibility of obtaining more direct and positive evidence, they are allowed, not only to testify to facts, but to give their opinions in evidence ; §§ 1276 *et seq.*

Q. 72.—Distinguish between the *admissibility* and the *credibility* of a witness.

A.—The former is a question to be decided by the judge alone, the latter is a question for the jury, § 22.

Q. 73.—How may a discovery at law be obtained from the opposite party?

A.—By order of the court or a judge, the plaintiff may with his declaration, and the defendant may with his plea, or either of them by leave of the court or a judge, may, at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or in the case of a body corporate, any of its officers, within ten days to answer the questions in writing by affidavit; § 482. [See 19 V. c. 48, ss. 175, 176—U. C. Con. St. c. 22, ss. 189, 190.]

Q. 74.—When may parol evidence be gone into, notwithstanding a written agreement exists?

A.—When the agreement is in the possession of the opposite party, who refuses to produce it upon notice, § 410; when it is in the hands of a stranger who is not compellable to produce it, and refuses to do so, upon being summoned by a *subpœna duces tecum*, or who being sworn without a *subpœna* admits that he has the instrument in court, § 427; when it is collateral to the issue, § 376.

Q. 75.—Under what general heads is the law of evidence treated of by Mr. Taylor?

A.—1. The nature and principles of evidence; 2, rules governing the production of testimony; 3, instruments of evidence.

Q. 76.—When are declarations against interest admissible? and why?

A.—When the declarant is dead, when he is shewn to have had a competent knowledge of the facts stated, and when the statement was against his interest—pecuniary or proprietary, §§ 603, 604. Such declarations are admissible as evidence on the ground of the extreme improbability of their falsehood, § 602.

Q. 77.—Mention some of the matters of which the courts will take judicial notice.

A.—The courts will judicially recognize the existence and titles of all the sovereign powers in the civilised world which are recognized by the government; they recognize the common and statute law, the law of nations, the law and custom of parliament, and the

privileges and course of proceedings of each branch of the legislature, the prerogatives of the crown, and the privileges of the royal palaces, the maritime law, the ecclesiastical law, the articles of war, royal proclamations, the rules of equity, the doctrines of trusts in some cases, the general practice of conveyancers, the custom of merchants where it has been settled by judicial determinations, the custom or law of the road, rules of navigation; particular customs tried, determined and recorded in a court are recognised by that court; the courts will also judicially notice public official seals; also facts which may certainly be known from the invariable course of nature; the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, and the local divisions of their country; the political constitution of their own government, and its essential political agents or public officers; the accession and demise of the sovereign; the existence of a war in which their country is engaged; days of special public fast or thanksgiving; and their own rules and course of proceeding. Chap. II.

Q. 78.—In what cases will a leading question be allowed?

A.—Where the witness, by his conduct in the box, obviously appears to be hostile to the party producing him, or interested for the other party, or unwilling to give evidence, the judge will in his discretion allow leading questions to be put to him: if he stand in a situation which of necessity makes him adverse, as if he be the adversary, leading questions may be asked him as a matter of right. A leading question may also be allowed where an omission in the witness' testimony is evidently caused by want of recollection, which a suggestion may assist. §§ 1262, 1263. Upon cross-examination leading questions may in general be asked, § 1288.

Q. 79.—How is the question of a privileged communication affected by the doctrine of *lis mota*?

A.—Where the professional adviser is the party interrogated, the question is not affected by the doctrine of *lis mota*, § 834; but the client may be compelled to disclose communications which pass *ante litem motam*, but not those made *post litem motam*, § 845.

STEPHEN ON PLEADING.

Question 1.—What is the distinction between a plea in abatement and a plea in bar?

Answer.—The former is an answer to the action itself merely, while the latter is a plea to the right of action, 46, 48.

Q. 2.—If in an action of debt for goods sold or work done, the defendant could shew that the goods were not of the quality ordered, or that the work was not done in such manner as ordered, what should be the defendant's plea? Explain your reasons for your answer to this question, and how you prove the sufficiency of the plea.

A.—The plea should be *never indebted*; because those defences deny the matters of fact upon which the implied contract declared on would arise,—for in the first instance there is adenial of the sale or delivery of any goods according to the order of the defendant, and in the latter case a denial of the performance of any work according to the order given; 148, 149; *Cousins v. Paddon*, 2 C. M. & R. 547; *Gardner v. Alexander*, 3 Dowl. 146; *Groundsell v. Lamb*, 1 M. & W. 352.

Q. 3.—Explain the rule that pleadings must shew authority.

A.—Where any party has occasion to justify under a writ, warrant, precept or other authority whatever, he must set it forth particularly in his pleading, and shew that he has substantially pursued such authority, 252.

Q. 4.—Mention the rules which tend to prevent obscurity and confusion in pleading.

A.—1, Pleadings must not be insensible, *i. e.*, unintelligible by the omission of material words, &c., nor repugnant, *i. e.*, inconsistent with itself, 309; 2, pleadings must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavourable to the party pleading, 310; 3, pleadings should not be hypothetical, or in the alternative, 314; 4, things are to be pleaded according to their legal effect or operation, 315; 5, pleadings should have their proper commencements and conclusions, 318; 6, a plea or subsequent pleading which is bad in part is bad altogether, 324.

Q. 5.—What does the plea of not guilty, in trespass, put in issue?

A.—In trespass, the plea of not guilty operates as a denial of the trespasses alleged, and no more, 155; *Heath v. Milward*, 2 Bing. N. C. 98; *Browne v. Dawson*, 12 A. & E. 624; *Jones v. Chapman*, 2 Exch. 803.

Q. 6.—State some of the rules as to shewing derivation of title.

A.—1, Where a party claims by inheritance, he must in general shew how he is heir, and if he claim by mediate, not immediate descent he must shew his pedigree; 236; 2, where a party claims by conveyance or alienation, the nature of the conveyance or alienation must in general be stated, 236; 3, the nature of the conveyance or alienation should be stated according to its legal effect, rather than its form of words, 237; 4, where the nature of the conveyance is such that it would at common law be valid without deed or writing, there no deeds or writing need be alleged in the pleading, though such document may in fact exist; but where the nature of the conveyance requires at common law a deed or other written instrument, such instrument must be alleged, 238.

Q. 7.—When is duplicity a fault in the declaration?

A.—When the declaration alleges in support of a single demand, several distinct matters, by any one of which that demand is sufficiently supported, 291.

Q. 8.—In what order must pleas of different degree be pleaded? and what is the effect of pleading any of them on a defendant's right to plead one prior in degree?

A.—Pleas must be pleaded in the following order: 1, pleas to the jurisdiction of the court; 2, pleas to the disability of the person—1, of the plaintiff, 2, of the defendant; 3, pleas to the declaration; 4, pleas to the action itself, in bar thereof, 344. If the defendant plead any of them, he is taken to waive or renounce all pleas of a kind prior in the series, 344.

Q. 9.—What is a new assignment, and in what cases is it necessary?

A.—A new assignment is a pleading in the nature of a replication, containing a more definite statement of the plaintiff's case than is given in the declaration; and is necessary in cases where, from the general terms in which the declaration is worded, the defendant is not sufficiently guided by it to the real cause of com-

plaint, and is therefore led to apply his plea to a different matter from that which the plaintiff has in view; 187, 192.

Q. 10.—What is the effect of demurring to a pleading as regards the facts stated in the pleading demurred to?

A.—The party demurring is taken to admit that the facts alleged in the pleading demurred to are true, 133; *Gundry v. Feltham*, 1 T. R. 334; *Tyler v. Bland*, 9 M. & W. 388.

Q. 11.—Show how *liberum tenementum* amounts to a good plea in confession and avoidance.

A.—A plea of *liberum tenementum* amounts to a good plea in confession and avoidance, because while it admits such a possession in the plaintiff as would entitle him to maintain the action against a wrong-doer, it asserts a freehold in the defendant with a right to the immediate possession, 241; *Doe v. Wright*, 10 A. & E. 763.

Q. 12.—What construction will be put on the language of a pleading which admits of two constructions?

A.—That construction will be put on the pleading which is most unfavourable to the party pleading; 310; *Dovaston v. Payne*, 2 H. Bl. 530; *Thernton v. Adams*, 5 M. & S. 38.

Q. 13.—Is there any, and if so, what class of pleas which neither traverse nor confess and avoid the declaration?

A.—Dilatory pleas, 183; also pleas in estoppel, 183, and pleas of tender, and payment into court, 186.

Q. 14.—What is a departure? and what is the first stage in pleading at which it can occur?

A.—A departure is when in any pleading the party deserts the ground that he took in his last antecedent pleading, and resorts to another, 327. The replication is the first pleading in which it can occur, 328.

Q. 15.—In what cases, in pleading a conveyance, should such conveyance be alleged to be in writing?

A.—Where the nature of the conveyance requires at common law a written instrument, 288.

Q. 16.—What alteration has been made by the Common Law Procedure Act in new assigning, where several pleas are pleaded to the declaration?

A.—That act prohibits the old practice of new assigning to each plea, and provides that in future there can be but one new assignment, though there be several pleas; and that the defendant shall

not be at liberty to plead to the causes of action newly assigned, any plea which he has already pleaded to the declaration (except a plea in denial), unless by leave of the court or a judge; 194. [See U. C. Con. St. c. 22, ss. 115, 116.]

Q. 17.—Is a plaintiff entitled to judgment *non obstante veredicto* in every case in which the issue found for the defendant is no answer to the declaration? if not, in what cases is he entitled to such judgment; and what, if any, is his remedy in cases where such issue being found for the defendant he is not entitled to judgment?

A.—The plaintiff is entitled to judgment *non obstante veredicto* in cases where the pleading which should have been demurred to discloses facts which shew that the case of the party is incurably bad, and could not be set right by any manner of allegation; but he is not entitled where the defective pleading is such that it might be made good by a different manner of pleading: in such cases his remedy is a repleader; 88, 91; *Rex v. Phillips*, 2 Str. 294; *Fancourt v. Bell*, 1 Bing. N. C. 668.

Q. 18.—What is the proper form of traversing a deed by a party, and by a stranger, respectively; and upon what doctrine does the distinction depend?

A.—A traverse by a party must be *non est factum*,—a traverse by a stranger should be *non concessit*, or *non demisit*. The reason of the distinction is that the doctrine of estoppel forbids a party to contradict his own deed (which he would in effect do by a plea of *non concessit* or *non demisit*), but that doctrine does not affect a stranger. 172. *Taylor v. Needham*, 2 Taunt. 278; *Morris v. Dimes*, 3 Nev. & M. 671.

Q. 19.—What is judgment of *respondeat ouster*, and to what class of pleas does it apply?

A.—Judgment of *respondeat ouster* is a judgment for the plaintiff that the defendant shall *answer over*, or plead anew to the plaintiff's action: it is given in the case of an issue of law, arising on a dilatory plea; 97.

Q. 20.—When does a discontinuance take place in pleading?

A.—A discontinuance takes place when, upon a demurrer or plea to part only of the declaration, the plaintiff is entitled to sign judgment of *nil dicit* in respect of the part unanswered, but demurs or replies to the plea without doing so; the plaintiff, by

not taking judgment as he was entitled to do for the part unanswered, does not follow up his entire demand, and a discontinuance ensues, 180.

Q. 21.—What is the difference between the old and the present system of pleading as regards *profert* and *oyer*?

A.—Before the Common Law Procedure Act, it was necessary in pleading a document, to make *profert*, or a statement in the pleading that the party brings the document into court, and thereupon the defendant might crave *oyer*, that is, to hear the document read, or rather to have an inspection, and might then set it forth in his pleading. By that act *profert* and *oyer* are abolished; and a party pleading in answer to any pleading in which any document is mentioned or referred to is allowed to set it out in his pleading, without *oyer*. [See U. C. Con. St. c. 22, ss. 78, 79.]

Q. 22.—Is the damage in any, and if so, what cases, a material point in issue? and if so, how is it put in issue?

A.—If an action be brought, not for specific recovery of goods, or sums of money, but for damages only, as in covenant, trespass, &c., and if the issue be an issue in law, or any issue in fact not tried by jury, the damages become a material point in issue—for the judgment of the court, *in banc*, is only that the plaintiff ought to recover his damages, without specifying their amount: it is put in issue by means of a writ of enquiry directed to the sheriff of the county where the facts are alleged by the pleadings to have occurred, before whom a trial is had to assess the damages; 97, 98.

Q. 23.—What is the method, if any, at present for taking objection to a pleading which, under the old system, would have been bad on special demurrer?

A.—In such cases the party objecting should apply to the court or a judge to strike out or amend the pleading, 182. [See U. C. Con. St. c. 22, s. 119.]

STATUTES, PLEADING AND PRACTICE—LAW.

Question 1.—Within what time must a new trial be moved for in criminal cases?

Answer.—It must be moved for on or before the last day of the first week of the term next succeeding the Court of Oyer and Terminer or Gaol Delivery at which the conviction takes place. U. C. Con. St. c. 113, s. 2.

Q. 2.—What is the rule with regard to counsel's speeches at *Nisi Prius*?

A.—Upon the trial of any cause the addresses of counsel to the jury are regulated as follows:—the party who begins, or his counsel, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, will be allowed to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, is then allowed to open his case, and also to sum up the evidence, if any; U. C. Con. St. c. 22, s. 209; the party who begins has then the right to reply if his adversary has adduced evidence; *Tayl. Evid.* § 361. In criminal prosecutions instituted by the Crown, the Crown has the right to reply although no evidence be adduced by the defendant; *ib.* § 362.

Q. 3.—When distinct parties to a note or bill are sued in the same action, are they competent witnesses for each other?

A.—When parties are so sued in one action, any defendant shall be entitled to the testimony of any co-defendant as a witness, in case such party so calling him would have been entitled to his testimony had he not been a party to the suit, or individually named in the record. 5 W. 4, c. 1, s. 9—U. C. Con. St. c. 42, s. 27.

Q. 4.—Is probate out of Upper Canada good evidence in the case of a will of realty; if so, are any and what steps to be taken before using it in evidence?

A.—By 16 V., c. 19, s. 5,—U. C. Con. St. c. 82, s. 11, where any person dies in any of Her Majesty's possessions out of Upper Canada, having made a will sufficient to pass real estate in Upper Canada, and by which lands in Upper Canada are devised or

affected, and such will is duly proved and remains filed in any court having the proof and issuing probate of wills in such place, the probate is made sufficient *primâ facie* evidence of the will and its contents, and of the proper execution of it, in Upper Canada. Before using it in evidence one month's notice of the intention to do so must be given to the opposite party.

Q. 5.—What is necessary to be stated in the rule *nisi* for a new trial?

A.—In every rule *nisi* for a new trial or to enter a verdict or nonsuit, the grounds upon which such rule has been granted shall be shortly stated therein; 19 V. c. 43, s. 168—U. C. Con. St. c. 22, s. 231.

Q. 6.—If a new trial is granted as contrary to evidence, what is the rule with regard to costs?

A.—The U. C. Con. St. c. 22, s. 232, enacts that if a new trial be granted on the ground that the verdict is against evidence, the costs of the first trial shall abide the event, unless the court otherwise order. Before that enactment, it was usually granted upon payment of costs; Ch. Arch. 1472.

Q. 7.—Where a party pleads and demurs to the same pleading, in what order are the issues of law and fact to be disposed of?

A.—By U. C. Con. St. c. 22, s. 109, the court or judge upon giving leave to a party to plead and demur to the same pleading at the same time, is empowered to direct which issue shall be first disposed of. If no direction be given, it is optional with the plaintiff which he will have determined first; Ch. Arch. 885.

Q. 8.—How many days' notice of trial is necessary? Has there been any change in this respect?

A.—Eight days' notice of trial is necessary—the first and last days being inclusive; U. C. Con. St. c. 22, s. 201. Formerly eight days' notice was requisite in the Superior Courts, and six days' notice in the County Courts, but by that enactment eight days' notice has been made requisite in all the courts.

Q. 9.—At whose instance can a new trial, in criminal matters, be granted?

A.—A new trial may be granted in criminal matters, upon the application of any person convicted of any treason, felony, or misdemeanor, before a Court of Oyer and Terminer or Gaol Delivery or Quarter Sessions. 20 V. c. 61, s. 1—U. C. Con. St. c. 113, s. 1.

Q. 10.—Where a commission is issued to examine witnesses in a foreign country, how must the answers to the interrogatories be returned?

A.—The examination must be proved by an affidavit of the due taking of such examination sworn before and certified by the mayor or chief magistrate of the city or place where the same has been taken, and must be returned annexed to the commission and such affidavit, to the court from which the commission issued, close under the hand and seal of one or more of the commissioners. U. C. Con. St. c. 32, s. 21. See N. R. Prac. 22.

Q. 11.—What is the power of a judge at Nisi Prius with regard to adjourning the trial?

A.—The court or judge at the trial of any cause may, when deemed right for the purposes of justice, order an adjournment for such time and subject to such terms and conditions, as to costs and otherwise, as they or he may think fit. 19 V. c. 43, s. 158—U. C. Con. St. c. 22, s. 208.

Q. 12.—In what cases will an order be granted for the inspection of documents in the possession of the opposite party?

A.—A party to any suit having documents in his custody or power relating to the suit, may, upon application by the opposite party, be compelled to produce such documents for inspection, in all cases in which formerly a discovery might have been obtained by bill or other proceeding in equity at the instance of the party applying. 16 V. c. 19, s. 8—U. C. Con. St. c. 22, s. 197.

Q. 13.—What are the proceedings in replevin, and in what cases can the action be brought in this Province?

A.—Before the writ of replevin issues, an order for the issue of it must be obtained from the court or a judge upon an affidavit of the person claiming the property or some other person, shewing to the satisfaction of the court or judge, the facts of the taking or detention complained of, the value and description of the property, and that the person claiming it is the owner, or that he is lawfully entitled to the possession of it. But this order may be dispensed with in certain cases. [See answer to question 82.] 23 V. c. 45, s. 1. Upon such order being granted a writ issues in the form A., U. C. Con. St. c. 29, s. 22, upon which the sheriff replevies the goods, having first taken a bond of indemnity in treble the value of the property, in the form B., *id.*, [see answer to

question 53.] which bond is assignable to the defendant. After the goods have been replevied, a copy of the writ is served upon the defendant personally, or if he cannot be found, by leaving it at his usual or last place of abode with his wife or some grown person, being a member of his household or an inmate of such house: the defendant also is summoned to appear within eight days after service, and if he fail to appear the plaintiff may enter an appearance for him; and upon appearance the suit usually proceeds as in ordinary cases, except where the taking is by a distress, in which case the defendant avows, and to his avowry the plaintiff pleads. See U. C. Con. St. c. 29. In this Province replevin may be brought where goods have been wrongfully distrained, or where goods have been otherwise wrongfully taken or detained, in cases in which trespass or trover will lie; U. C. Con. St. c. 29, s. 1.

Q. 14.—When is judgment *non obstante veredicto*; and when is a repleader granted? Has the Common Law Procedure Act made any change with regard to costs on judgment *non obstante*?

A.—Judgment *non obstante veredicto* will be given in cases where, though a verdict has been found for the defendant, it appears to the court on retrospective examination of the record, that the cause of action stands confessed by him thereon; Steph. Pl. 88; Ch. Arch. 1481. A repleader will be granted when after issue joined and verdict thereon, the pleading is found (upon examination) to have miscarried, and failed to effect its proper object of raising an apt and material question, and one proper to decide the action, between the parties; Steph. Pl. 90. Ch. Arch. 1483. The C. L. P. Act, s. 219—U. C. Con. St. c. 22, s. 319, enacts, that upon judgment *non obstante veredicto*, the party against whom judgment is given shall have his costs occasioned by the trial of any issues in fact arising out of the pleading for defect of which such judgment is given. Before that enactment neither party was entitled to the costs of the issues; Ch. Arch. 1483.

Q. 15.—What is the effect of a defendant in ejectment not appearing at the trial?

A.—If the claimant appears and the defendant fails to appear at the trial, the defendant is taken to have admitted the claimant's title, and the latter is entitled to a verdict and to judgment for his costs, without any proof of his title. 19 V., c. 43, s. 237—U. C. Con. St., c. 27, s. 24. N. R. Prac., c. 94.

Q. 16.—What changes have recently taken place with regard to the law of arrest?

A.—The principal changes with regard to the law of arrest were made by 22 V., c. 96, which enacted that no person should be held to bail for less than one hundred dollars; and that no writ of *capias* should issue except upon a judge's order, upon the affidavit of the plaintiff or of some other person shewing a cause of action to one hundred dollars, and stating such facts and circumstances as may satisfy the judge that there is good and probable cause for believing that the debtor, unless forthwith apprehended, is about to quit Upper Canada with intent to defraud his creditors generally or the plaintiff in particular. By 22 V., c. 83, it is enacted that no person shall be arrested for costs, and that no married woman shall be arrested: by that act also arrest under process of the Court of Chancery is restricted as arrest at law is restricted by c. 96. U. C. Con. St., c. 24.

Q. 17.—Within what time after the date of the first writ of attachment against an absconding debtor must a creditor place his attachment in the hands of the sheriff to entitle him to share, if the property of the debtor is insufficient to satisfy all demands?

A.—When the property of the absconding debtor is insufficient to satisfy all demands, none shall share unless their writs of attachment were placed in the hands of the sheriff for execution within six months from the date of the first writ of attachment. 19 V., c. 43, s. 57.—U. C. Con. St., c. 25, s. 31.

Q. 18.—How many peremptory challenges is a prisoner entitled to; and what is the right of the Crown in objecting to jurors?

A.—A prisoner arraigned for murder or other felony is entitled to twenty peremptory challenges; a person arraigned for a misdemeanor is entitled to three. U. C. Con. St., c. 31, ss. 99, 100: If the officers of the crown challenge any jurors, they must assign a cause certain, the truth of which is to be tried according to the custom of the court, *ib.* s. 101.

Q. 19.—When will lands acquired after the making of a will pass under it?

A.—When the will (if made by a person dying after 6th March, 1834,) contains a devise in any form of words of all such real estate as the testator shall die seised or possessed of, or of any

part or proportion thereof, lands subsequently acquired will pass under it. U. C. Con. Stat., c. 82, s. 11.

Q. 20.—From what time does a *fi. fa.* bind the property of the debtor?

A.—From the time of delivery to the sheriff for execution. 20 Car. 2, c. 3, s. 16. Ch. Arch. 578.

Q. 21.—How are costs taxed where a plaintiff in a superior court recovers judgment for an amount within the jurisdiction of an inferior court?

A.—Unless the judge before whom the case was tried has certified for full costs, the plaintiff can only recover the costs which would have been incurred in the inferior court; and so much of the defendant's costs as between attorney and client as exceed the costs which he would have incurred in the inferior court, shall be set off against the plaintiff's verdict and costs, and if the defendant's costs, so allowed, exceed the plaintiff's verdict and costs, the defendant may issue execution for the excess. U. C. Con. St., c. 22, s. 328.

Q. 22.—What is the effect of misjoinder of defendants in an action of contract; has any change taken place in this respect?

A.—In case of the joinder of too many defendants in any action on contract, the court or a judge, if it appears that injustice will not be done thereby, may at any time before the trial or assessment of damages, order the name or names of one or more of such defendants to be struck out, upon such terms as to the court or judge may seem meet; and in case it appears at the trial of any action on contract, that there has been a misjoinder of defendants, such misjoinder may be amended as a variance at the trial, and upon such terms as the court or judge or other presiding officer by whom such amendment is made thinks proper; 19 V., c. 43, s. 70—U. C. Con. St., c. 22, s. 68. Formerly, where a misjoinder appeared on the pleadings, either of the defendants might demur, move in arrest of judgment, or bring a writ of error; and if the objection did not appear on the pleadings, the plaintiff might be non-suited at the trial, upon failing to prove a joint contract.

Q. 23.—In what case may a writ of summons be specially endorsed; and what is the effect of such endorsement?

A.—Where the defendant resides within the jurisdiction of the

court, and the demand is for a debt or liquidated demand in money with or without interest, arising upon a contract express or implied. U. C. Con. St., c. 22, s. 15. Upon filing a summons so endorsed with an affidavit of service after a default in appearance, the plaintiff may sign final judgment for a sum not exceeding the sum claimed by the writ, with interest and costs, and issue execution at the expiration of eight days from the last day for appearance; *ib.*, s. 55. Upon such judgment no proceedings in error or appeal lie, but upon application upon satisfactory affidavits accounting for non-appearance and disclosing a defence upon the merits, the court or a judge will let in the defendant to appear; *ib.* 55. See Ch. Arch. 176.

Q. 24.—In what cases may a commission for the examination of witnesses be issued?

A.—Where a party to a suit is desirous of having at the trial of a cause the testimony of any aged or infirm person resident in Upper Canada, or of any person about to withdraw therefrom or who is residing without the limits thereof, a commission may issue to take the evidence of such person. U. C. Con. St., c. 32, s. 19. See Ch. Arch. 316.

Q. 25.—What special remedy is provided by a statute in this province against overholding tenants?

A.—Where a tenant overholds after the expiration of his term, the landlord may apply to either of the superior courts of common law in term, or to a judge in vacation, upon an affidavit stating the circumstances, upon which the court or judge may order a writ to issue directed to such person as they or he may appoint, upon which such person holds an inquisition by a jury of twelve men, to be summoned by the sheriff, to try whether the person complained of was tenant to the complainant for a term which has expired, and whether he overholds wrongfully; upon the return of the writ, the court or a judge may issue a precept to the sheriff commanding him to place the landlord in possession; U. C. Con. St., c. 27, ss. 68—73.

By Stat. 23 V. c. 43. jurisdiction is given to County Courts in actions of ejectment brought by landlords against overholding tenants, where the yearly value of the premises, or the rent, does not exceed two hundred dollars.

Q. 26.—What causes of action are now permitted to be joined?

A.—Causes of action of whatever kind provided they be by and against the same parties and in the same rights; excepting replevin and ejectment, and causes in County Courts where the causes of action are local and arise in different counties. U. C. Con. St., c. 22, s. 73. Ch. Arch. 206.

Q. 27.—What is essential to the validity of a chattel mortgage?

A.—A chattel mortgage is absolutely null and void as against creditors of the mortgagor and as against subsequent *bond fide* purchasers for value, unless it be registered within five days* after the execution in the office of the clerk of the County Court of the county or union of counties in which the mortgagor resides, or if he be not resident in Upper Canada, in which the property is at the time of execution of the instrument; U. C. Con. St. c. 45, ss. 1, 3, 7. Together with the instrument must be filed an affidavit of execution, and an affidavit of the mortgagee or his agent—if the agent be aware of all the circumstances connected therewith, and be properly authorised in writing to take the mortgage (in which case a copy of the authority must be filed,)—stating “that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith and for the express purpose of securing the payment of the money justly due or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him;” *ib.* ss. 1, 2.

Q. 28.—From what office can writs of summons in local and transitory actions respectively be issued?

A.—Where the cause of action is local, the writ issues from the office of the clerk or deputy clerk of a superior court within the proper county or from the county court of that county; where it is transitory, the writ issues from the office of the clerk or deputy clerk of a superior court in any county, or from any county court. 19 V. c. 43, ss. 6, 7—U. C. Con. St., c. 22, ss. 7, 8.

* The Queen's Bench hold that the filing of a bill of sale or chattel mortgage within the five days allowed by the statute has relation to the date of the instrument, so as to protect the chattels assigned from the effect of intermediate writs of execution; *Feehan v. Bank of Toronto*, 19 U. C. Q. B. 474. The Common Pleas hold the reverse; *Feehan v. Bank of Toronto*, 10 U. C. C. P. 32.

Q. 29.—Can an equitable defence be set up at common law in an action of ejectment, or in a case stated for the opinion of the court, without pleadings? Give your reasons.

A.—It cannot; for it cannot be set up in cases where there are no pleadings. Ch. Arch. 995. *Neave v. Avery*, 24, L. J. C. P. 207. But the court will exercise an equitable jurisdiction in cases of ejectment; Ch. Arch., 974; *Thrustout v. Shenton* 10 B. & C. 110.

Q. 30.—What is the effect of the marriage of a woman plaintiff or defendant, during the progress of the suit?

A.—By 19 V. c. 43, s. 215—U. C. Con. St. c. 22, s. 144, it is enacted that marriage of a woman plaintiff or defendant, shall not cause the action to abate, (as it would have done in the case of a woman plaintiff before that enactment; Ch. Arch. 1504); but the action may notwithstanding be proceeded with to judgment; and such judgment may be executed against the wife alone, or by suggestion or writ of revivor, judgment may be obtained against husband and wife; if judgment be for the wife, execution may be issued by the authority of the husband without any writ of revivor or suggestion.

Q. 31.—When a verdict is taken subject to arbitration, what is the method of enforcing the award?

A.—The successful party may enter up judgment upon the verdict as awarded, and issue execution in the ordinary way; Ch. Arch. 1630: but if the award be not made until after the expiration of the time when judgment may be entered (the fifth day of the term following the trial), the submission must be made a rule of court before judgment is entered; *Lawrie v. Russell*, 1 U. C. Prac. R. 36, 65.

Q. 32.—Within what time must a rule enlarged from a previous term be mentioned to the court to prevent its lapsing?

A.—All enlarged rules must be drawn up for the first day in the ensuing term, unless otherwise ordered by the court, N. R. Prac. 122.

Q. 33.—In what cases can the court or a judge make a compulsory reference to arbitration, and at what period of a suit?

A.—In cases where the matters in dispute consist wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, a compulsory reference of such matters to arbitration may be made. This may be done at any time after the writ has issued. U. C. Con. St. c. 22, s. 158.

Q. 34.—In what cases is a sheriff entitled to an interpleader? is he bound to make any and what enquiry into the nature of the claim set up?

A.—Where any claim is made to any goods or chattels taken or intended to be taken under an attachment against an absconding debtor, or in execution, or to the proceeds or value thereof, by any person other than the person against whom the writ issued, the sheriff may apply to the court from which the process issued, or to any judge having jurisdiction in the case, to grant an interpleader summons; U. C. Con. St. c. 30, s. 8. The sheriff, before he makes the application, is bound to inquire of the nature of the claims set up, and to ascertain whether the execution creditor submits to, or intends to contest them; for if it appear to have been brought before the court without reasonable cause, the sheriff may be ordered to pay the costs; Ch. Arch. 1341; see *Bishops v. Hinxman*, 2 Dowl. 166.

Q. 35.—Has there been any statutory alteration with regard to costs where judgment is arrested?

A.—Formerly when judgment was arrested, each party paid his own costs; Ch. Arch. 1486. By 19 V., c. 43, s. 219—U. C. Con. St. c. 22, s. 319, it is enacted that the court shall adjudge to the party against whom judgment is given, the costs occasioned by the trial of any issues in fact arising out of the pleading for defect of which judgment is given, and upon which such party has succeeded.

Q. 36.—What is the course under the Common Law Procedure Act for compelling a plaintiff to proceed to trial?

A.—Where issue has been joined, but the plaintiff neglects to bring it to trial in the following cases, viz. —in *town causes* where issue is joined in, or in the vacation before Hilary, Trinity or Michaelmas term, and the plaintiff neglects to bring the issue to trial at or before the second assize following such term, or if the issue be joined in, or in the vacation before Easter term, and if the plaintiff neglects to bring the issue to trial at or before the first assizes thereafter; and in *country causes* where issue is joined in, or in the vacation before Hilary or Trinity term, and the plaintiff neglects to bring the issue to trial before the second assizes following such term, or if issue be joined in, or in the vacation before Easter or Michaelmas term, and the plaintiff

neglects to bring the issue to trial at or before the first assizes after such term,—or in *cases in the County Court*, if the plaintiff neglects to bring the issue to trial at the first sittings after issue joined,—the defendant may give the plaintiff twenty days' notice to bring the issue to trial at the assizes or sittings next after the expiration of the notice; and if the plaintiff does not then proceed to trial, the defendant, upon entering a suggestion of the facts, may sign judgment for his costs; U. C. Con. St. c. 22, s. 227.

Q. 37.—What is the distinction between an avowry and a cognizance?

A.—An avowry is where the defendant in replevin sets up right or title in himself,—a cognizance is when he alleges the right or title to be in another person, by whose command he acted; Steph. Pl. 169 (p.).

Q. 38.—What is necessary in dower to entitle the plaintiff to recover costs?

A.—Costs are allowable to the demandant where a demand in writing has been made of the dower claimed from the tenant one month before action brought, and if the action be brought within a year from such demand; unless it appear that the tenant offered to assign the dower demanded before action brought. 13 & 14 V. c. 58, s. 6—U. C. Con. St. c. 28, s. 7.

Q. 39.—At what period of a suit can a commission be obtained for the examination of witnesses?

A.—In general the application cannot be made until after issue joined, *Mondell v. Steele*, 8 M. & W. 300; 9 Dowl. 812; but this rule may be and often is relaxed where a case of necessity is made out, *Fydney v. Beasley*, 20 L. J. (Q. B.) 395; the application may be refused if not made within a reasonable time after issue joined. Ch. Arch. 317.

Q. 40.—What is the effect of a plaintiff omitting to endorse his writ specially, when he might have done so?

A.—He will not be entitled to the costs of the declaration upon judgment being signed for want of a plea, or to more costs than if he had made such special endorsement, and signed judgment for non-appearance; 19 V., c. 43, s. 61; U. C. Con. St., c. 22, s. 57; Ch. Arch. 178, 940.

Q. 41.—What is the effect of suing the different parties to the same note or bill in different actions?

A.—If several suits be brought on one instrument against the different parties to it, there shall be collected or received from the defendants the costs taxed in one suit only, at the election of the plaintiff, and in the other suits the actual disbursements only shall be collected or received from the defendant; 5 W. IV. c. 1. s. 1, —U. C. Con. St. c. 22, s. 329, and c. 42, s. 35.

Q. 42.—Where two arbitrators are appointed, one by each party, and by the terms of the submission the two are to choose a third arbitrator, but are unable to agree upon one, how can such third arbitrator be appointed?

A.—Any party to the submission may, upon default of the arbitrators to appoint such third arbitrator, serve them with a written notice to make the appointment; and if they fail to do so within seven clear days after service of the notice, such party may apply to any judge of either of the Superior Courts of Law, or of the Court of Chancery, or to a County Court judge if the submission be made in a cause in his County Court, to appoint a third arbitrator, and such judge may, upon summons to be taken out by the party, make the appointment; U. C. Con. St. c. 22, s. 168.

Q. 43.—Is there any, and if so, what difference, between the effect of a *nolle prosequi* entered before and after judgment?

A.—If a *nolle prosequi* be entered before judgment, it is no bar to a future action for the same cause, except where it is entered against one of several defendants, and where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff; *Cooper v. Tiffin*, 3 T. R. 511; 1 Wils. 90; 1 Saund. 207. If entered after judgment it operates as a retraxit, and bars any future action for the same cause; *Bowden v. Horn*, 7 Bing. 716. Ch. Arch. 1442.

Q. 44.—What facts must a sheriff shew to entitle him to interplead?

A.—He must shew that the goods have been seized by him under execution, that they are in his hands and that a claim has been made in respect of them by some third person; Ch. Arch. 1340; *Northcote v. Beauchamp*, 1 M. & Sc. 158.

Q. 45.—In what cases can damages be recovered in an action of dower?

A.—Damages may be recovered where the tenant has refused

to assign the dower, to the value of the dower from the time the right accrued until it is assigned; Park on Dower, 301.

Q. 46.—What is the course of proceeding for the purpose of garnishing a debt?

A.—The judgment creditor (either before or after examination of the judgment debtor as to debts due to him) makes an *ex parte* application to a judge, upon an affidavit stating that judgment has been recovered and is still unsatisfied, and stating to what amount, and that the garnishee is indebted to the judgment debtor and is within the jurisdiction, (and also stating the nature of the debt to be garnished, and that a *fi. fa.* has been issued and returned *nulla bona*, or facts sufficient to show to the court or judge that if a *fi. fa.* had been issued it would have been so returned), for an attaching order by which the debt is bound in the hands of the garnishee from the time of service of it upon him; by the same or a subsequent order, the garnishee is ordered to appear before the judge or any officer of the court appointed by him, to shew cause why he should not pay over the debt to the judgment creditor, or so much of it as may be sufficient to satisfy the judgment debt: in cases in the Superior Courts where the amount to be garnished is within the jurisdiction of a County or Division Court, the order to appear is to appear before the Judge of the County Court or Division Court of the county within which the garnishee resides; if the garnishee fail to appear to shew cause, or if he do not forthwith pay the debt into court, or do not dispute the debt, execution may be immediately issued upon a judge's order for the amount of the debt, or a sufficient part of it to satisfy the judgment debt. If the garnishee dispute the debt, upon obtaining an order of the judge to that effect, the judgment creditor may proceed against the garnishee, by writ calling upon him to shew cause why there should not be execution against him for the debt, or so much of it as may be sufficient to satisfy the judgment debt, and costs; upon which writ the proceedings are similar to the proceedings upon a writ of revivor. U. C. Con. St., c. 22, s. 288 *et seq.*

Q. 47.—Within what time must a defendant appear in an action of ejectment?

A.—Within sixteen days after service of the writ. U. C. Con. St. c. 27, s. 2. This is exclusive of the day of service, but inclusive of the day of appearance.

Q. 48.—What instruments are the proper subjects of registration under the registry laws of Upper Canada ?

A.—1, Deeds, conveyances and assurances of or affecting in law or in equity lands in Upper Canada, subsequent to the grant from the Crown. 2, Powers of attorney under which any such deed, conveyance or assurance has been executed. 3, Wills and devises of or affecting lands, after the testator's death. 4, Decrees of foreclosure, and all other decrees affecting any title or interest in land. 5, The filing of a bill or taking of proceedings in Chancery, or of a County Court on its equity side, whereby any title or interest in lands in Upper Canada may be brought in question. 6, Satisfaction of mortgages. U. C. Con. St. c. 89, s. 17.

Q. 49.—Where a *ca. re.* has been obtained against a defendant, is anything further necessary to entitle the plaintiff in the same cause subsequently to issue a *ca. sa.* ?

A.—In such case it is not necessary before issuing a writ of *ca. sa.* to obtain a judge's order or file any further or other affidavit than that upon which the order authorizing the defendant's arrest was obtained in the first instance ; U. C. Con. St. c. 24, s. 12.

Q. 50.—In what case is attachment for contempt abolished ?

A.—Process of contempt for non-payment of any sum of money, or for non-payment of costs, payable by decree or order of the Court of Chancery, or by any rule or order of the Courts of Queen's Bench or Common Pleas, or of a judge thereof, or by any decree, rule or order of a County Court or a judge thereof ; U. C. Con. St., c. 24, s. 13.

Q. 51.—What is the effect of pleading a plea on equitable grounds without leave of a judge ?

A.—Where a plea on equitable grounds is pleaded with other pleas without leave, interlocutory judgment may be signed against such plea ; Watt v. George, U. C. L. J., April, 1857.

Q. 52.—In what may the performance of conditions precedent be now stated in pleading ; and how must the performance be traversed by the opposite party ?

A.—The performance of conditions precedent may be averred generally ; but the opposite party shall not deny such performance generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest ; 19 V., c. 98, s. 106—U. C. Con. St. c. 22, s. 80.

Q. 53.—What are the usual conditions in a replevin bond ?

A.—The conditions are that the plaintiff shall prosecute his suit against the defendant for the taking or detention complained of, with effect and without delay, and that he will make a return of the property if a return be adjudged, and that he will pay such damages as the defendant shall sustain by the issuing of the writ of replevin, if the plaintiff fails to recover judgment, and that he will observe, keep, and perform all rules and orders made by the court in the suit ; U. C. Con. St. c. 29, *Form B* ; 23 V. c. 45, s. 5.

Q. 54.—What must a judge certify to entitle plaintiff to full costs in an action of trespass where the verdict is for less than forty shillings ?

A.—The judge must certify on the back of the record that the action has really been brought to try a right besides the right to recover damages for the trespass or grievance complained of, or that the trespass or grievance in respect of which the action was brought was wilful and malicious ; 19 V., c. 43, s. 312—U. C. Con. St. c. 22, s. 324.

Q. 55.—Mention some pleas which may be pleaded together without leave.

A.—A plea denying any contract or debt alleged in the declaration, a plea of tender as to part, a plea of the statute of limitations, set off, discharge of the defendant under any Bankrupt or Insolvent law, *plene administravit*, *plene administravit præter*, infancy, coverture, payment, accord and satisfaction, release, not guilty, a denial that the property any injury to which is complained of is the plaintiff's, leave and license, *son assault demesne* ; U. C. Con. St. c. 22, s. 112 : also a plea containing a defence arising after action, and pleas containing defences arising before action ; N. R. Plead. 22.

Q. 56.—What is the effect of a garnishee order attaching a debt before an order to pay over is made ?

A.—It binds the debt due from the garnishee in his hands ; U. C. Con. St. c. 22, s. 289.

Q. 57.—What are the exceptions to the statutory prohibition against a person insolvent, or on the eve of insolvency making a transfer of his property ?

A.—A transfer of his property shall not be deemed fraudulent

and void if made by him more than three months before the filing of his petition, and not with the view and intention of petitioning the court for protection from process ; 8 V. c. 48, s. 27—U. C. Con. St. c. 18, s. 57.

Q. 58.—In an action of slander where the plaintiff recovers less than 40s., what costs can he recover without a certificate, and what must a judge certify to entitle him to recover more ?

A.—He can recover no costs unless the judge certify that the slander, in respect of which the action is brought, was wilful and malicious ; U. C. Con. St. c. 22, s. 324.

Q. 59.—What objections can a defendant take to an award upon a plea of *nul tiel award* ?

A.—A plea of *nul tiel award* to an ordinary action on award, simply puts in issue the fact of the making of the award : if pleaded to an action on a bond with a condition to abide by an award, it raises the question of the validity of the award ; if pleaded to a declaration which avers that an award was made of and concerning the premises, it puts in issue the fact of an award being made respecting all the matters referred, but does not raise the question of validity ; Tayl. Evid. § 272.

Q. 60.—How many years' arrears of interest is a mortgagee out of possession entitled to recover ?

A.—He can only recover six years' arrears ; except in the case of a subsequent mortgagee when a prior mortgagee or other incumbrancer has been in possession or in receipt of the profits, who may recover the arrears of interest which accrue due during the whole time that such prior mortgagee or incumbrancer remains in possession or receipt ; 4 W. IV. c. 1, s. 45—U. C. Con. St. c. 88, ss. 19, 20.

Q. 61.—How many years' arrears of dower are recoverable in Upper Canada ?

A.—Six years'. U. C. Con. St. c. 88, ss. 18, 19.

Q. 62.—If a mortgagee dies, who can convey the legal estate upon the mortgage debt being paid off ?

A.—By U. C. Con. St. c. 87, s. 5, the executor or administrator of the mortgagee is empowered to convey the legal estate, when such executor or administrator is entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt.

Q. 63.—If the defendant in an action of ejectment does not appear at the trial, what is necessary to entitle the plaintiff to a verdict?

A.—If the plaintiff appears at the trial, and the defendant does not appear, the plaintiff shall be entitled to recover without any proof of his title; 19 V. c. 43, s. 237—U. C. Con. St. c. 27, s. 24.

Q. 64.—When will a devise of lands by a tenant in fee simple, without words of inheritance, carry the fee?

A.—By 4 W. IV. c. 1, s. 50—U. C. Con. St. c. 82, s. 12, where land is devised, it shall be considered that the deviser intended to devise all such estate as he was seised of in the land, unless it appears on the face of the will that he intended to devise only a less estate than he was so seised of.

Q. 65.—How must a will of lands be attested?

A.—A will of lands must, by 4 W. IV. c. 1, s. 51—U. C. Con. St. c. 82, s. 13, be executed in the presence of, and attested by, two or more witnesses, who must subscribe their names in the presence of each other, although they need not subscribe in the presence of the testator.

Q. 66.—Under a conveyance to two or more persons, without words indicating whether they are to take as joint tenants, or tenants in common, how will they take? Are there any, and what classes of persons to whom the rule does not apply?

A.—By 4 W. IV. c. 1, s. 48—U. C. Con. St. c. 82, s. 10, under a conveyance to two or more persons, in the absence of express limitation they shall be considered to take as tenants in common, and not as joint tenants. By that enactment, executors and trustees are expressly excepted,—and they take as joint-tenants.

Q. 67.—How do relatives of the half blood take by descent?

A.—Relatives of the half blood take by descent, next in order after relatives in the same degree of the whole blood and their issue, where the common ancestor is a male, and next after the common ancestor where such common ancestor is a female; 4 W. IV. c. 1, s. 8—U. C. Con. St. c. 82, s. 21.

Q. 68.—Is a plea of accord without satisfaction, or satisfaction without accord, or either of them, a good plea?

A.—Accord without satisfaction is a bad plea; satisfaction without accord may be pleaded. Com. Dig. tit. Accord.

Q. 69.—Mention some causes of action in which money cannot be paid into court.

A.—Money cannot be paid into court in actions for assault and battery, false imprisonment, libel, slander when not within the fifth section of the Act respecting libel and slander (U. C. Con. St. c. 103), malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant; U. C. Con. St. c. 22, s. 90.

Q. 70.—Where the time for making an award is enlarged by judge's order, and no time is specified in such order, for how long a time is the enlargement?

A.—Where no period of enlargement is stated in the order it is deemed an enlargement for one month; U. C. Con. St., c. 22, s. 172.

Q. 71.—What is the effect of a creditor obtaining judgment against his debtor as an absconding debtor, where it afterwards appears to the court that such debtor was not an absconding debtor?

A.—The defendant will recover his costs of defence; and the plaintiff will, by rule of court, be disabled from issuing execution for the amount of his verdict, unless it exceeds the defendant's costs, and then only for the excess: if the defendant's costs exceed the verdict, he will be entitled to have execution for the balance after deducting the amount of the verdict. U. C. Con. St. c. 25, s. 20.

Q. 72.—What is the course to be pursued when a plaintiff dies during the progress of a suit?

A.—If there be two or more plaintiffs, and the cause of action survive to the others upon the death of one of them, the death should be suggested on the record, upon which the action will proceed at the suit of the survivors: if a sole plaintiff die, his legal representative may, by leave of the court or a judge, enter a suggestion of the death, and that he is the legal representative, and the action shall thereupon proceed: if such suggestion be entered before trial, the truth of it shall be tried. U. C. Con. St. c. 22, ss. 162, 133.

Q. 73.—In what cases can the court or a judge direct that a plaintiff shall be at liberty to proceed against an absent defendant without his having entered an appearance?

A.—Where they are satisfied that there is a cause of action which arose in Upper Canada, or in respect of a breach of a contract made therein, and that the writ has been personally served, or that reasonable efforts have been made to effect personal service, and that it came to his knowledge, and either that the defendant wilfully neglects to appear, or that he is living out of Upper Canada in order to defeat or delay his creditors. U. C. Con. St. c. 22, s. 44.

Q. 74.—What is the penalty incurred by a tenant who is served with a writ of ejectment, and omits to notify the same to his landlord?

A.—He forfeits to his landlord the value of three years' improved or rack rent of the premises, which may be recovered in any court of common law having jurisdiction for the amount; U. C. Con. St. c. 27, s. 50.

Q. 75.—How far are persons interested in a suit admissible as witnesses?

A.—By U. C. Con. St. c. 32, ss. 3, 4, it is enacted that no person offered as a witness, shall be excluded from giving evidence by reason of incapacity as a witness. By s. 15, a party to a suit is enabled to call his opponent as a witness, upon serving him with a *subpoena*, or giving due notice of his intention to examine him. By s. 5, it is enacted that, unless called by the opposite party, a person cannot be a witness who is a party to the suit, individually named in the record, or a claimant or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin makes cognizance, or any beneficial plaintiff or defendant, or the husband or wife of any such. By the same section, the wife of a party to a suit is disabled from being called as a witness by the opposite party. Where a party to the suit is called as a witness by the opposite party, there is much doubt as to how far he is a competent witness; the Court of Queen's Bench has decided that he can only give evidence touching points upon which he is examined by the party calling him, and that the cross-examination must be restricted to those points; the Court of Common Pleas holds the reverse; *Lamb v. Ward*, 18 U. C. Q. B. 304; *Dickson v. Pinch*, 11 U. C. C. P. 146.

Q. 76.—In what cases can the court or a judge direct that a

plaintiff shall be at liberty to proceed against an absent defendant without his having entered an appearance ?

A.—Where a summons has been issued against a British subject residing out of Upper Canada, the court or a judge may direct that the plaintiff shall be at liberty to proceed, without appearance having been entered by the defendant, upon being satisfied that there is a cause of action which arose in Upper Canada, or in respect of the breach of a contract made therein, and that the writ has been personally served on the defendant, or that reasonable efforts have been made to effect personal service upon him, and that it came to his knowledge, and either that he wilfully neglects to appear to the writ, or that he is living out of Upper Canada in order to defeat or delay his creditors ; 19 V., c. 43, s. 35; U. C. Con. St., c. 22, s. 44.

Q. 77.—In what, if any, cases of ejectment can mesne profits be recovered at the trial of the action of ejectment ?

A.—Whenever it appears on the trial of an ejectment at the suit of a landlord against his tenant, that the tenant or his attorney has been served with due notice of trial, the judge may permit the plaintiff, after proof of his right to recover possession of the lands or any part thereof, to go into evidence of the mesne profits which have or might have accrued from the day of the expiration or determination of the tenant's interest down to the time of the verdict or a day preceding to be specially mentioned therein, and if the jury find for the claimant they shall give a verdict for the amount of the damages to be paid for such mesne profits ; 19 V., c. 43, s. 267 ; U. C. Con. St., c. 27, s. 60.

Q. 78.—In what cases is the venue in replevin local, and in what transitory ?

A.—When replevin is brought for goods distrained for any cause, the venue must be laid in the county in which the distress has been made ; in other cases it may be laid in any county : U. C. Con. St., c. 29, s. 13.

Q. 79.—In what manner can a plaintiff suing upon a lost negotiable instrument prevent such loss being set up as a defence ?

A.—If a plaintiff, suing upon a lost negotiable instrument, give to the defendant an indemnity to the satisfaction of the court or a judge, or of any officer of the court to whom such indemnity is referred, against the claims of any other person upon

him in respect of such instrument, the court or a judge may order that such loss shall not be set up as a defence in the action; 19 V., c. 43, s. 292; U. C. Con. St., c. 42, s. 33.

Q. 80.—What is the effect of a party to a suit refusing to admit a document saving just exceptions after having been duly called on by notice to do so? and what is the effect of omitting to give such notice?

A.—In case of refusal to admit a document after notice to admit, the costs of proving it shall be paid by the party so refusing, whatever the result of the trial may be, unless at the trial the judge certify that the refusal to admit was reasonable; N. R. Prac. 30. If such notice be not given, no costs of proving the document shall be allowed, except in cases where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense; *ib.*

Q. 81.—Where provisions of the Consolidated Statutes differ in effect from the statutes for which they are substituted, which provisions are to prevail?

A.—As respects matters antecedent to the time when the Consolidated Statutes took effect, the provisions of the repealed acts prevail; as to matters subsequent to that time, the provisions of the Consolidated Statutes are to prevail; 22 Vic., c. 29, sec. 9.

Q. 82.—In what, if any, cases can a writ of replevin issue without an order of a judge?

A.—A writ of replevin may issue without a judge's order, 1st, where the affidavit for the writ, in addition to the usual statements of ownership and value, states that the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession, within two calendar months next before the making of the affidavit, and that the deponent is advised and believes that the claimant is entitled to an order for the writ, and that there is good reason to apprehend that unless the writ is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect of the property; and 2nd, in case the property was distrained for rent or damage feasant, and the affidavit states, in addition to the usual statements, that the property was distrained and taken under colour of a distress for rent or damage feasant; 23 V., c. 45, s. 1.

Q. 83.—What is the proper mode of enforcing the attendance of witnesses before an arbitrator, when the submission has been made a rule of court?

A.—The party requiring the attendance of the witness should make an application to the court by which the rule was made, or to the court, if any, named in the agreement, or a judge thereof, or if there be none such, to either of the Superior Courts or a judge thereof, setting forth the place of residence of the witness, upon which the court or judge may make a rule or order compelling the attendance of the witness; U. C. Con. St., c. 22, s. 180.

Q. 84.—What is the proper course to be taken by a plaintiff when an equitable plea is pleaded which cannot properly be dealt with by the court?

A.—The plaintiff must apply to the court or a judge to strike it out;—U. C. Con. St., c. 22, s. 127.

Q. 85.—In what cases, in which an appeal lies from the common law courts, is it necessary to obtain leave to appeal?

A.—In criminal cases; U. C. Con. St., c. 13, s. 29.

Q. 86.—What is the effect of demurring to evidence?

A.—All the facts proved are admitted by the demurrer, but their sufficiency to maintain the issue is denied; Ch. Arch. 48.

Q. 87.—Can an award under a compulsory reference be enforced, and if so, how, before the time for moving to set it aside has elapsed?

A.—An award made under a compulsory reference may, by authority of a judge, on such terms as to him seems reasonable, be enforced at any time after six days from the time of publication, notwithstanding that the time for moving to set aside has not elapsed; U. C. Con. St., c. 22, s. 166.

Q. 88.—Within what time must a bond be perfected and executed so as to stay execution in the case of an appeal from the decision of a County Court judge?

A.—It must be perfected and executed within four days after the decision to be appealed has been given; U. C. Con. St., c. 15, s. 67.

Q. 89.—What is a departure in pleading?

A.—A departure is where in any pleading a party deserts the ground that he took in his last antecedent pleading and resorts to another; Steph. Plead, 327.

Q. 90.—At what period of a suit may either party with or without leave of the court or a judge serve interrogatories on the opposite party ?

A.—The plaintiff with the declaration or the defendant with his plea may serve interrogatories without such leave ; U. C. Con. St., c. 22, s. 190 ; either of them may serve interrogatories at any other time by leave of the court or judge, *ib.*

Q. 91.—What is the effect of a reversal of a judgment, by virtue of which a judgment creditor has garnished a debt, upon the garnishee, who has paid over to such creditor the amount due from him to the judgment debtor, under a regular order ?

A.—It does not affect him, as such payment by him is a valid discharge ; U. C. Con. St., c. 22, s. 297.

Q. 92.—When a cause has been sent from one of the Superior Courts to the County Court, what steps should be taken to prevent entering judgment if it is desired that the case should stand for motion in the superior courts ?

A.—In such case the judge who tries the cause, should endorse on the record under his hand a certificate that the case is one which, in his opinion, should stand for motion in the court in which it was brought, in which case judgment cannot be entered until the fifth day of the following Superior Court term : 23 V. c. 42, s. 4.

Q. 93.—What notice of appeal to the Court of Error and Appeal must be given to the opposite party, in cases in which notice is necessary ?

A.—A memorandum, entitled in the court and cause, signed by the party or his attorney, alleging that there is error in law in the record and proceedings (which must also be filed with the clerk of the Crown of the court wherein the suit was instituted), together with a statement of the grounds of error intended to be argued ; U. C. Con. St. c. 13, ss. 33, 34.

Q. 94.—What is the statutory rule with regard to speeches of counsel at Nisi Prius ?

A.—U. C. Con. St. c. 22, s. 209, enacts : " The party who begins, or his counsel, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, shall be allowed to address the jury a second time at the close of such case, for the purpose of summing up the

evidence; and the party on the other side, or his counsel, shall then be allowed to open his case and also to sum up the evidence (if any), and the right to reply shall be the same as at present.'

Q. 95.—In what cases can a submission to arbitration be made a rule of court?

A.—In all cases where it is not expressly agreed that it shall not be made a rule of court; U. C. Con. St. c. 22, s. 176.

Q. 96.—What is the course to be pursued where several causes of action have been joined, if, in the opinion of the judge, they cannot be conveniently tried together?

A.—The court or a judge may order separate records to be made up, and separate trials to be had; U. C. Con. St. c. 22, s. 74.

Q. 97.—To what extent and of what facts is a protest, by the law of Upper Canada, evidence?

A.—It is '*prima facie* evidence of the allegations and facts therein contained;' Can. Con. St. c. 57, s. 6.

Q. 98.—In what cases can a suit within the jurisdiction of the superior courts be sent for trial before a county court judge?

A.—A suit may be sent from the superior courts to be tried in a county court, when the amount of the demand is ascertained by the signature of the defendant, or in the case of an action for any debt in which a judge of either of the superior courts shall be satisfied that the case may safely be tried in the county court; 23 V. c. 42, s. 4.

Q. 99.—Under what circumstances can the court or a judge order a person not originally joined as plaintiff in an action to be so joined?

A.—If it appears to the court or judge that injustice will not be done by such amendment, and if the person so to be joined consents in writing under his hand to be joined; 19 V. c. 43, s. 67—U. C. Con. St. c. 22, s. 63.

Q. 100.—What is necessary in entering an appearance to a writ of ejectment when the defendant intends to set up title in himself?

A.—The defendant must file with the appearance a notice stating that besides denying the plaintiff's title, he asserts title in himself, and setting forth the mode in which such title is claimed; U. C. Con. St. c. 27, s. 8.

Q. 101.—Under what circumstances will an amendment be allowed at the trial in case of misjoinder of defendants?

A.—If it appear to the court or judge, or officer presiding at the trial, that such misjoinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons to be struck out were joined without their consent, or consent in writing under his or their hand or hands to be struck out; U. C. Con. St. c. 22, s. 68.

Q. 102.—What is the present course (instead of attachment) to enforce an award for payment of money where the order of reference has been made a rule of court?

A.—Judgment may be signed upon the order of reference, and execution issued thereon. See U. C. Con. St., c. 22, s. 158.

Q. 103.—What must be the nature of a debt to be the subject of garnishment?

A.—It must be a debt for which the defendant can sue, and the payment of which is not secured by a bill of exchange or promissory note,—and must be a liquidated amount; Ch. Arch. 57.

Q. 104.—What is the effect of withdrawing a record, withdrawing a juror, and the jury being discharged, respectively?

A.—Where a record is withdrawn, the trial is postponed; and the record cannot be re-entered at the same assize, except under special circumstances; Ch. Arch. 360.

Withdrawing a juror puts an end to the cause; and each party pays his own costs: if any further proceedings be taken, they will be stayed upon application; and so if a second action be brought, it will be stayed upon application within a reasonable time. Ch. Arch. 386; *Gibbs v. Ralph*, 15 L. J. (Exch.) 7; 14 M. & W. 804; *Stodhard v. Johnson*, 3 T. R. 657.

Where the jury is discharged by consent, the trial is postponed, but the suit is not terminated. Ch. Arch. 386; *Everett v. Youells*, 3 B. & Ald. 349.

Q. 105.—What was the effect of the registration of a judgment, and how has this been changed by a recent statute?

A.—A judgment, when registered, became a charge upon all the lands of the defendant within the county where registered. By 24 V. c. 41, the registration of judgments is abolished on and after 1st September, 1861.



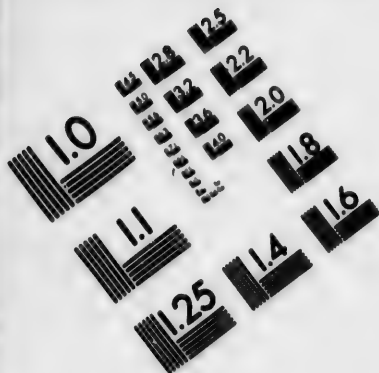
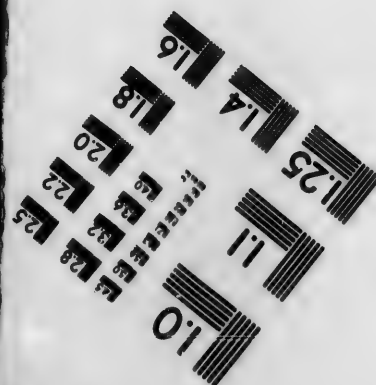
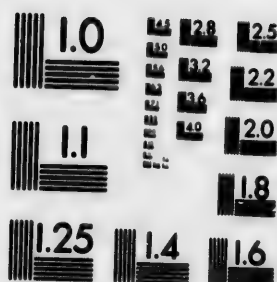


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Q. 106.—What steps must be taken to enforce an award,—1st, where a verdict is taken subject to an award; 2nd, where no verdict is taken, but the submission is made a rule of court?

A.—[As to first part of this question, see answer to Q. 31.] In the latter case judgment is entered upon the rule and execution issued thereon.

Q. 107.—Under what circumstances can the master of a female servant still maintain an action for the seduction of such servant?

A.—Where the father or mother of the female seduced have, before the seduction, abandoned her and refused to provide for and retain her as an inmate; if the father or mother be not resident in Upper Canada at the time of the birth of the child, or being resident therein does not bring an action within six months from the birth of the child. U. C. Con. St., c. 77, ss. 2, 3.

Q. 108.—What are the provisions of the statutes as to warehouse receipts?

A.—By Can. Con. St., c. 92, s. 68, it is enacted that any person wilfully and knowingly giving warehouse receipts for goods before the goods have been delivered to him, with intent to mislead, deceive, injure or defraud any person or persons, or if any person knowingly and wilfully accepts, transmits or uses such receipt, such person shall be guilty of a misdemeanor, punishable by imprisonment in the penitentiary for any term not exceeding three years nor less than two years, or in any other prison for any term less than two years but not less than one year. By Can. Con. St., c. 54, s. 8, warehouse receipts may be endorsed as collateral security for the payment of bills and notes discounted by incorporated banks or for any debt due to private persons; and by 24 V., c. 23, s. 1, this may be done where the person by whom the warehouse receipt is given is himself the owner of or entitled to the goods. By the latter enactment the wilful making of any false statement in any such receipt, or wilfully parting with or not delivering the goods, is made a misdemeanor punishable as above.

Q. 109.—What statutory provisions exist as to the registration of different instruments?

A.—By Stat. 35 G. III., c. 5, registry offices were originally established, and by 9 V., c. 34, and 16 V., c. 187, they were regulated upon their present footing. The several enactments as to the instruments which may be registered are consolidated by U. C. Con.

St. c. 89, s. 17, —which sec. has been repealed as to the registering of judgments, and decrees, rules and orders for payment of money, by 24 V. c. 41: the instruments which may be registered are: 1, deeds, conveyances and assurances of or affecting in law or equity, lands in Upper Canada subsequent to the grant of such lands by the Crown, excepting leases for a term not exceeding twenty-one years; 2, powers of attorney under which such instruments have been executed; 3, wills and devises of and affecting such lands, the testator being dead; 4, decrees of foreclosure and other decrees affecting the title or interest in land; 5, the filing of a bill or taking of proceedings in a court of equity, whereby any title or interest in lands in Upper Canada may be brought in question; 6, satisfaction of mortgages. 9 V., c. 34, ss. 7, 8—U. C. Con. St., c. 89, ss. 19—22, regulates the requisites of a memorial for registry; every memorial must be in writing or partly printed and partly written, and must contain, 1, the date of the instrument or will, the names and additions of all the parties to the instrument, or of the devisor, testator or testatrix of the will, as set forth in the instrument or will; 2, the names and additions of all the witnesses to the instrument or will, and their places of abode; and 3, it must mention the lands contained in the instrument or will, and the city, town, township or place in the county or riding where the lands are situate, as described in the instrument or will, or to the same effect; the memorial of an instrument other than a power of attorney, must be under the hand and seal of some one or more of the parties thereto, or of the grantee's heir, executors or administrators, guardians or trustees; the memorial of a power of attorney must be under the hand and seal of one or more of the constituents or of the constituted; the memorial of a will must be under the hand and seal of a devisee, or of the executors, administrators, guardians or trustees of a devisee: every memorial must be attested by two witnesses, one of whom, in the case of all instruments, and in the case of wills made and published out of Upper Canada, must be a witness to the instrument or will, by the affidavit of which latter witness the execution of the instrument or will, or probate thereof, and of the memorial is proved; the mode of proof for registration is regulated by several statutes, consolidated by the same Act, ss. 23, 28, 34, 35. By 9 V., c. 34, s. 6—U. C. Con. St. c. 89, s. 44, assurances not registered are to be deemed fraudu-

lent and void as against subsequent purchasers for value (without notice.) By 9 V., c. 34, s. 83—U. C. Con. St. c. 89, s. 78, registry of plans of subdivisions of land into towns or villages is made compulsory. By 9 V., c. 11, s. 29—U. C. Con. St., c. 83, s. 31, conveyances by tenants in tail are required to be registered within six months after execution.

Q. 110.—When will replevin lie?

A.—When goods have been wrongfully distrained; and where there is a wrongful taking or detention of goods (except by a sheriff or other officer under execution) for which an action of trespass or trover might be brought. U. C. Con. St. c. 29, ss. 1, 2. Ch. Arch. 1034.

Q. 111.—What circumstances must exist to permit "a defence on equitable grounds" to an action at law?

A.—The party pleading must under the facts disclosed thereby be entitled to an absolute and unconditional injunction in a court of equity against the judgment which the opposite party might otherwise obtain at law. Stephen on Pleading, 197. U. C. Con. St., c. 22, s. 124. *Teede v. Johnson*, 11 Ex. 840.

Q. 112.—How is an action of ejectment revived?

A.—Upon the death of one of several claimants, whose right survives to the others, the suit may be proceeded with by such survivors upon a suggestion of the death; if his right does not survive, or in the case of a sole claimant, his legal representative may by leave of the court or a judge, carry on the suit upon entering a suggestion of the death, and that he is such legal representative; if he do not do so, the survivors, in the case of several claimants may proceed for their shares upon suggesting the death. After a verdict for two or more claimants if one die, the others may suggest the death and proceed to judgment and execution. Upon the death of one of several defendants who defend jointly, a suggestion may be made of the death, and the action may proceed against the survivors. Upon the death of a sole defendant or of several defendants, upon a suggestion thereof, the claimants shall be entitled to recover unless some one appears and defends within a time appointed for that purpose by order of the court or a judge, made upon application by the claimants. Upon the death of a defendant after verdict, the claimants may proceed to judgment without making a suggestion. 19 V., c. 43, ss. 245—252—U. C. Con. St. c. 27, ss. 31—41.

Q. 113.—In what cases is a judgment debtor who obtains judgment subsequent to the attachment of an absconding debtor's goods entitled to priority over the attaching creditor?

A.—Where a suit has been commenced against a defendant in any court of record in Upper Canada before the issuing of a writ of attachment against him as an absconding debtor, the plaintiff may proceed to judgment and execution in the usual manner; and if he obtains execution before the plaintiff in the writ of attachment, he shall have priority over him, but subject to the prior satisfaction of the costs of suing out and executing the attachment if the court or a judge so order; 19 V., c. 43, s. 55—U. C. Con. St., c. 25, s. 21.

Q. 114.—What is the effect of a verdict for the defendant on a plea of *non cepit* in replevin? and to what extent, if at all, are the sureties in the replevin bond liable in such a case?

A.—The defendant cannot have a return of the goods; Chit. Plead., 7th ed., 291. In such case the sureties on the replevin bond are liable for the costs of defence.

Q. 115.—From what date is a recovery in ejectment evidence of the plaintiff's title in a subsequent action for mesne profits?

A.—From the date of the verdict, or from some day specially mentioned therein; 19 V., c. 43, s. 267—U. C. Con. Stat. c. 27, s. 60.

Q. 116.—What, if any, cases are there over which a County Court has no jurisdiction?

A.—County Courts have no jurisdiction in the following cases: 1, where the title to land is brought in question,—excepting in the case of ejectment against overholding tenants, where the yearly value of the premises, or the rent, does not exceed \$200, (23 V. c. 43); 2, where the validity of any devise, bequest, or limitation under any will or settlement is disputed; 3, in actions of libel or slander; 4, in actions for criminal conversation or seduction; 5, in any action against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto; 6, in personal actions where the debt or damages claimed exceeds the sum of \$200; and 7, in causes and suits relating to debt, covenant and contract, where the amount claimed exceeds \$400,—excepting cases sent down for trial from the Superior Courts under 23 V. c. 42, s. 4. U. C. Con. St. c. 15, ss. 16, 17.

Q. 117.—What is the effect of an omission to state in the

margin of a demurrer some substantial matter of law intended to be argued? Is it any objection to the demurrer being argued?

A.—If it be omitted, the court or a judge may set aside the demurrer, and may give leave to sign judgment as for want of a plea; U. C. Con. St. c. 22, s. 121. The want of a marginal note is no ground for objecting to the argument of the demurrer, Ch. Arch. 881; *Lacy v. Umbers*, 3 Dowl. 732.

Q. 118.—How many different kinds of juries can be had for the trial of civil causes in Upper Canada?

A.—Two kinds; a common jury, and a special jury; U. C. Con. St. c. 31, ss. 2, 108.

Q. 119.—Can an action be brought as for lands bargained and sold on an *indebitatus* count, when no conveyance is made? Give your reasons.

A.—It cannot; for the vendor cannot have the land and the value of it; *Laird v. Pim*, 7 M. & W., 474.

Q. 120.—Draft a plea in abatement for non-joinder of a co-contractor as a defendant?

A.—“The defendant, by E. F. his attorney, prays judgment of the said writ and declaration, because he says that the supposed promises in the said declaration mentioned were made jointly with one G. H., who is still living, and at the commencement of this suit and still is resident within the jurisdiction of this court, to wit, at the *Town of St. Catharines*, in the County of *Lincoln*, and not by the defendant alone: and this the defendant is ready to verify. Wherefore inasmuch as the said G. H. is not named in the said writ and declaration, together with the said defendant, the defendant prays judgment of the said writ and declaration, and that the same may be quashed.” See Steph. Plead. 45.

Q. 121.—How many days are allowed to plead in abatement?

A.—Four days after service of declaration; of which the first is inclusive and the last exclusive; Ch. Arch. 869. *Ryland v. Worwald*, 5 Dowl. P. C., 581.

Q. 122.—State what must be shown by affidavit to obtain the oral examination of a judgment debtor, pursuant to 22 V. c. 96—U. C. Con. St. c. 24, s. 41.

A.—The affidavit must state the judgment recovered, and the amount remaining due; the issue of a writ of *fi. fa.* upon the judgment, and that such writ has been returned *nulla bonis* to the

whole or part, or facts sufficient to satisfy the court or judge that if such writ had been issued it would have been returned *nulla bona*; that the defendant is within the jurisdiction of the court; and that the action was not commenced or carried on against the defendant as an absconding debtor.

STATUTES, PLEADING AND PRACTICE,—EQUITY.

Question 1.—Into how many parts is a bill in equity now divided?

Answer.—Into four parts. It must contain, 1, the name and description of each party complainant; 2, the name of each party defendant; 3, a statement of the plaintiff's case in clear and concise language; 4, a prayer for the specific relief to which the plaintiff supposes himself entitled; but the prayer for general relief may be added; Ch. Ord. IX.

Q. 2.—Is a mortgagee, after a sale under a decree producing a sum insufficient to pay the mortgage debt, entitled to any personal remedy in equity against the mortgagor for the unpaid residue of the debt?

A.—Where the mortgagee's bill prays a sale, and that any balance of the mortgage debt which may remain due after such sale may be paid by the mortgagor, the same may be decreed accordingly; Ch. Ord. XXXII. sec. 3. The order for payment of such balance must be against the mortgagor, and not his assignee; *Turnbull v. Symmonds*, 6 Grant, 615. When a sale is ordered at the instance of an incumbrancer, the mortgagee may have the same order against the mortgagor if he is a party to the suit.

Q. 3.—Is there any, and what statutory provision in Upper Canada as to the liability of purchasers from trustees to see to the application of the purchase money?

A.—12 V. c. 71, s. 10—U. C. Con. St. c. 90, s. 9, enacts that the *bonâ fide* payment of any money to, and the receipt thereof by any person to whom the same shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the

misapplication thereof, unless the contrary be expressly declared by the instrument creating the trust or security; *Place v. Spawn*, 7 Grant, 406.

Q. 4.—In what cases will an infant be entitled to a day to shew cause in the decree?

A.—Where an infant is a defendant in a suit, he has six months after he comes of age to shew cause against the decree, and a reservation to that effect must be made in the decree; *Smith's Ch. Pr.* 453. *Mair v. Kerr*, 2 Grant, 223. But when such infant defendant is a trustee of real estate, it is not necessary to reserve a day to shew cause; *Lake v. McIntosh*, 7 Grant, 532.

Q. 5.—What course should a receiver take if he is resisted in acquiring possession of property which he claims under the order?

A.—He should apply to the plaintiff to make application to the court for an order to commit the party interfering with the property. It is a contempt of court for any person to disturb the possession of the receiver, or to attempt to exercise any rights in relation to the property over which he is appointed; *Smith's Ch. Pr.* 612.

Q. 6.—When the plaintiff in a foreclosure suit dies before decree, what is the course of proceeding to revive the suit?

A.—When a suit abates before final decree, the court may direct an amendment of the record by an order to be applied for on notice of motion specifying the nature of the amendment, and the applicant's title to the same; *Ch. Ord. IX. sec. 15.*

Q. 7.—What matters of account can the master investigate without a special reference?

A.—In taking accounts in the master's office, it is within the cognizance of the master to take the same with rests or otherwise; to take account of rents and profits received, or which, but for wilful neglect or default, might have been received; to set occupation rent; to take into account, necessary repairs and lasting improvements, and costs and other expenses properly incurred or claimed to be so. And generally, in taking accounts, to enquire and adjudge as to all matters relating thereto, as if the same had been specially referred—subject to the revision of the court on appeal; *Ch. Ord. XLII. sec. 13.*

Q. 8.—State the practice as to motion for decrees.

A.—Where a party has given notice of motion for decree, he is

to set the cause down to be heard on such motion not less than ten days before the day for which such notice is given, unless he shall have obtained an order allowing a less time for such purpose.

Motions for decrees are allowed only in three cases, namely:—
1, where there is no evidence: 2, where the evidence consists only of documents, and such affidavits as are necessary to prove their execution or identity, without any necessity of any cross-examination: 3, where infants are concerned, and evidence is necessary only so far as they are concerned for the purpose of proving facts which are not disputed; Ch. Ord. 29th June, 1861: but this order does not apply to cases in which, but for the order, the court would grant leave to serve short notice of motion for decree, no order to prevent irreparable injury.

Q. 9.—What is the effect of a plaintiff dismissing his own bill after the cause is set down for hearing?

A.—Such dismissal is equivalent to a dismissal on the merits, unless the court order otherwise, and it may be set up in bar to another suit for the same matter; Ch. Ord. III. (1857).

Q. 10.—In what cases has the Court of Chancery jurisdiction to decree alimony?

A.—By 7 W. IV. c. 2, s. 3—20 V. c. 56, s. 2—U. C. Con. St. c. 12, s. 29, the Court of Chancery has jurisdiction to decree alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause, and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights; and such alimony, when decreed, will continue until the further order of the court. Interim alimony will be ordered on proof of the marriage without reference to the merits of the case.

Q. 11.—What is necessary to make a suit in chancery a *lis pendens* so as to bind the property in litigation?

A.—The registration, in the proper county registry office, of a certificate from the registrar or deputy registrar, setting forth that "in a suit or proceeding in Chancery, between A. B. and C. D., some title or interest is called in question in the following land (describing it.)" U. C. Con. Stat. c. 12, s. 64.

Q. 12.—From what time does the Statute of Limitations move

in cases of bill to redeem mortgaged property, and what is the period within which suits must be instituted?

A.—From the time when the mortgagee obtained possession, or receipt of the profits, or from the date of any acknowledgment in writing of the mortgagor's title or right to redeem, signed by the mortgagee or person claiming through him. Such suit must be instituted within twenty years from the time when the statute commenced to run; U. C. Con. St. c. 88, s. 21. The disabilities clauses of the statute apply to redemption of mortgages; Caldwell v. Hall, 6 U. C. L. J., 141.

Q. 13.—What is the statute law as to sales of equities of redemption under execution? what are its provisions as to the liability of the purchaser at sheriff's sale to pay the mortgage debt, and as to the indemnity of the mortgagor against such debt?

A.—By 12 V. c. 73, s. 1—U. C. Con. St. c. 22, s. 257, the legal and equitable interest of a mortgagor in the mortgaged property may be sold under a *fi. fa.* lands issued against him, and upon such sale, by s. 2, all the legal and equitable estate therein which he had at the time the writ was placed in the sheriff's hands, and the same rights as he would have had if such sale had not taken place, vest in the purchaser, his heirs and assigns, who may pay off the mortgage debt in the same manner as the mortgagor might have done, and will, upon such payment, be entitled to a discharge of the mortgage, which has the same effect as a discharge given to the mortgagor. By s. 3, the mortgagee, whether a party to the suit or not, may purchase the equity of redemption at such sale, but is compelled to give the mortgagor a release of the mortgage debt, or if he enforce payment of the mortgage debt, the mortgagor may demand re-payment, and bring an action for money had and received therefor in one month after such demand, and until re-payment, the mortgagor has a charge upon the mortgaged lands therefor. By 20 V. c. 3, s. 11—U. C. Con. St. c. 22, s. 260, the equity of redemption in chattels is made subject to sale under execution.

Q. 14.—How many days must intervene between the service of a notice of motion and the making of the motion?

A.—At least two clear days, (unless the court give special leave to the contrary,) not reckoning Sundays, or days on which the offices are closed. Ch. Ord. XXXIX., sec. 2.

Q. 15.—Within what time after answer can an order as of course to amend a bill be obtained?

A.—Within four weeks, and before filing replication. Ch. Ord. IX., s. 12.

Q. 16.—What is the practice of the Court of Chancery as to the re-hearing of causes? How is the application for a re-hearing made, and how often may a cause be re-heard?

A.—The party applying for a re-hearing may file a petition in the cause; and he must therewith deposit with the registrar the sum of ten pounds. One re-hearing may be had upon petition signed by counsel; but no petition for a second re-hearing is to be filed without leave of the court first had upon a special motion for the purpose. Ch. Ord. IX., secs. 17 and 18, and Ord. XLIII., sec. 7.

Q. 17.—What time has a defendant to demur to a bill?

A.—One month after service of the original bill or bill amended before answer, or a month after notice of the amendment of the bill. But where a party is served out of the jurisdiction, then within the time limited by the order. Ch. Ord. XII., sec. 2.

Q. 18.—What is the practice substituted by the general orders for the old practice of examining parties *pro interesse suo*?

A.—Any party who might under the old practice have moved to be examined *pro interesse suo*, may apply to the court, upon motion, for such relief as he may think himself entitled to, upon which the court, in its discretion, may grant or refuse the motion, or may give such directions for the examination of parties or witnesses, or for making further enquiries, or for the institution of any suit or action, as the circumstances of the case may require. At least three weeks notice of such motion must be given, and within ten days from service thereof the opposing party must file his affidavits, and within six days after the expiration of such ten days, the party moving must file his affidavits in reply. Ch. Ord. XLI.

Q. 19.—In what cases can the Court of Chancery, by its order or decree, vest property without a conveyance? Is this jurisdiction given by any and what statute?

A.—In every case in which the Court of Chancery has authority to order the execution of a deed, conveyance, transfer, or assignment of any property, real or personal, the court may make an order or a decree vesting such real or personal estate in such person or persons and in such manner and for such estates as would be done by any such deed, conveyance, assignment or transfer if

executed; this jurisdiction is given by statute 20 V. c. 56, s. 8—U. C. Con. St. c. 12, s. 63.

Q. 20.—How many years' arrears of interest on a legacy is a legatee entitled to?

A.—Six years; 4 W. 4, c. 1, s. 45—U. C. Con. St. c. 88, s. 19.

Q. 21.—What is the form of proceeding to be adopted by an executor who desires to have the estate administered under the direction of the Court of Chancery?

A.—The executor may apply to the court upon motion, without bill filed or any other preliminary proceeding, for an order for the administration of the estate, and the court may thereupon make an order for administration as the circumstances of the case may require. Ch. Ord. XV.

Q. 22.—What statutory powers has the Court of Chancery in Upper Canada over the real estate of infants and lunatics?

A.—The Court of Chancery in Upper Canada is empowered by 12 V. c. 72, to sell the real estate of infants where such sale is deemed necessary for the infant's interest, (see more fully, answer to question 83,) unless there are provisions to the contrary in some will or conveyance by which such lands have been devised or granted to, or for the use of, the infant, and to order the infant, or some one for him to convey the estate; but to an application for such sale the infant's consent is requisite, if he is seven years of age or upwards. By 9 V. c. 10, s. 1—U. C. Con. St. c. 12, s. 31, the Court of Chancery in Upper Canada is given the same jurisdiction over the property of lunatics as is in England conferred by the Crown upon the Lord Chancellor. Upon a person being found lunatic, his property is committed to the care of some person, (1 Bl. Com. 305,) who is required to manage the same under the general supervision of the court, and who may be authorized to mortgage or sell the real estate, if it be necessary for the maintenance of the lunatic or his family, or for the education of his children, U. C. Con. St. c. 12, ss. 37-44. By 13 & 14 V. c. 50, s. 6—U. C. Con. St., c. 12, s. 47, the court is empowered to bind infants and lunatics by partition of estates held by them as joint-tenants, tenants in common, or co-parceners.

Q. 23.—From what time does the Statute of Limitations run against a *cestui que trust* asking relief in equity against a sale of real estate by an express trustee in breach of trust?

A.—From the time such land shall have been conveyed to a purchaser for a valuable consideration, 4 W. 4, c. 1, s. 35—U. C. Con. St. c. 88, s. 32; see also *Beckit v. Wragg*, 7 Grant, 220; 5 U. C. L. J., 181, 209.

Q. 24.—Can the Statute of Frauds be taken advantage of in equity in demurrer to the bill? Can the Statute of Limitations be so taken advantage of?

A.—The Statute of Frauds cannot be taken advantage of by demurrer, but such a defence must be put in by answer; Story Eq. Pl. §§ 761–768. Where it appears on the face of the bill that the cause of action is barred by lapse of time, a demurrer will lie, *ib.* §§ 484, 503; if the objection does not appear on the face of the bill, it must be taken advantage of by answer, *ib.* § 503.

Q. 25.—Is the misjoinder of co-plaintiffs an objection for which a bill will be dismissed at the hearing?

A.—No suit is to be dismissed by reason only of misjoinder of persons as plaintiffs therein. But the court may modify its decree or direct amendment according to the special circumstances of the case. Ch. Ord. XXXI.

Q. 26.—Is a widow in any cases, and if so what, entitled to dower out of an equitable estate?

A.—When a husband dies beneficially entitled to any land for an interest which does not entitle his widow to dower out of the same at law, and such interest whether wholly equitable or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance (other than an estate in joint tenancy,) then his widow shall be entitled in equity to dower out of the same land. 4 W. 4. c. 1, ss. 13, 14, 15—U. C. Con. St. c. 84, s. 1.

Q. 27.—By what statute was a Court of Chancery erected in Upper Canada? Does the act referred to contain any and what special provisions as to the redemption of mortgages?

A.—Stat. 7 Wm. 4, c. 2,—1837. By that Act the court is empowered, in all cases of mortgage where the mortgagee's estate had become absolute at law before 4th March, 1837, to make such order and decree with respect to foreclosure or redemption as might appear just and reasonable under all the circumstances of the case, subject, however, to appeal to the Court of Error and Appeal; U. C. Con. St. c. 12, sec. 58.

Q. 28.—If a bill to redeem is dismissed at the hearing, what is the effect of the decree?

A.—To foreclose the plaintiff of all right, title, interest, and equity of redemption in the mortgaged premises.

Q. 29.—If a suit by the vendor for the specific performance of a contract for the sale of real estate become abated by the death of the vendor before decree, who are the proper parties to revive the suit, and what is the course of proceeding to revive?

A.—The personal representatives; and unless they have power to convey the vendor's interest in the estate, the person in whom the same is vested, or who has such power must also be brought before the court; Smith's Ch. Pr. 241. The amendment is by notice of motion, Ch. Ord. IX., sec. 15.

Q. 30.—Will the Court of Chancery make a decree declaratory of the rights of the parties merely, without granting any consequential relief?

A.—No suit is to be open to objection on the ground that a merely declaratory decree or order is sought thereby; but the court may make a binding declaration of right without granting consequential relief. Ch. Ord. XXVIII.

Q. 31.—Has the Court of Chancery jurisdiction in any and what cases to decree the cancellation of a grant by letters patent of Crown Lands? Does the jurisdiction depend on statute, or is it inherent in the court?

A.—The Court of Chancery has jurisdiction in cases where letters patent of crown lands have issued through fraud, or in error or improvidence to decree such patents to be void: this jurisdiction is given by statute 23 Vic. c. 2, s. 25.

Q. 32.—If a sole plaintiff die before decree, what steps must be taken by the defendant to obtain an order for the dismissal of the bill for want of prosecution?

A.—The defendant may move the court on notice to the personal representatives of the deceased plaintiff, for an order directing such personal representatives to revive the suit within a limited time, or in default that the bill be dismissed without costs; Smith's Ch. Pr. 372.

Q. 33.—At what stage of the cause can a defendant in a suit in equity obtain an order to elect? and how is such an order obtained?

A.—After he has filed his answer. The order is obtained on *præcipe*.

Q. 34.—Is a party to a suit in equity entitled to treat an order clearly irregular as void, and disregard it; or is he bound to obey it until set aside?

A.—He cannot treat it as void and disregard it; but should move without delay to set it aside; Smith's Ch. Pr. 69.

Q. 35.—Is a defendant against whom a *pro confesso* decree has been made entitled upon any and what conditions to have the cause re-heard?

A.—A defendant waiving all objections to the order to take a bill *pro confesso*, and submitting to pay such costs as the court may direct, may have the cause re-heard upon the merits stated in the bill; the petition for re-hearing being signed by counsel as other petitions for re-hearing. Ch. Ord. XIV., sec 8.

Q. 36.—Can a bill be taken *pro confesso* against an infant defendant?

A.—An order to take a bill *pro confesso* against a defendant who at the time of the making of such order is an infant, is irregular and of no validity; Ch. Ord. XIII. sec 5.

Q. 37.—Who are the necessary parties to a bill filed to carry into execution the trusts of an ordinary deed of assignment for the benefit of creditors?

A.—The creditors, or one of them on behalf of all others, the assignee and the debtor.

Q. 38.—What alteration has been made in the practice as to granting commissions of lunacy, by a late Act of Parliament?

A.—The Court of Chancery may, on sufficient evidence, declare a person a lunatic without the delay or expense of issuing a commission to inquire into the alleged lunacy, except in reasonable doubt; 20 V. c. 56, s. 5.—U. C. Con. St. c. 12, s. 33.

Q. 39.—At what stage of a cause can the plaintiff give notice of motion for a decree?

A.—When the defendants have answered the original or amended bill, or when the time for answering the amended bill has expired, and before replication; Ch. Ord. XVI.

Q. 40.—In what manner is an abatement before decree remedied?

A.—When a suit becomes defective, or abates, by an event subsequent to its institution, and before final decree, the court may direct an amendment of the record, in order that such defect may

be remedied, and the suit continued, and the benefit thereof obtained; Ch. Ord. IX. sec. 15.

Q. 41.—How must an infant sue in equity?

A.—By his next friend.

Q. 42.—What is the proper proceeding to enforce obedience to the decrees or orders of the Court of Chancery?

A.—First by an order *nisi* that the party do the act within a time limited, or stand committed then by an order absolute to commit, and then by writs of attachment and sequestration.

Q. 43.—What is the next proceeding in a cause in Chancery, after a demurrer to the bill has been overruled?

A.—The defendant answers the bill or it may be taken *pro confesso* against him.

Q. 44.—An answer to a bill having been filed, and no subsequent proceedings having been taken by the plaintiff within the time limited for that purpose, what course of proceeding is open to the defendant?

A.—The defendant may move the court, upon notice, that the bill may be dismissed with costs for want of prosecution, and the court may order the same accordingly. Ch. Ord. XXIV. sec. 1.

Q. 45.—What is meant by the expression that a suit is abated? in what manner is an abatement remedied?

A.—By the expression that a suit is abated, is meant that it has ceased, and cannot be further prosecuted. When some event occurs after the commencement of the suit which alters the case made by the bill, such as the death of plaintiff or defendant, change of interest, or marriage of a female plaintiff.

Q. 46.—To a suit by a *cestui que trust* to carry into execution the trusts of a deed of assignment for the benefit of creditors, who are the necessary parties?

A.—The debtor and his assignees.

Q. 47.—What is the effect upon a future suit between the same parties, in respect of the same matter, of a plaintiff taking an order to dismiss his own bill after the cause is set down for hearing?

A.—Such dismissal is equivalent to a dismissal on the merits, unless the court order otherwise, and may be set up as a bar to another suit for the same matter. Ch. Ord. (Dec. 1857,) III. sec. 8.

Q. 48.—What are the requisites of a bill ?

A.—It is to be in the form of a petition addressed to the Chancellor and must contain: 1st, the name and description of the party complainant; 2nd, the name of each party defendant; 3rd, a statement of the plaintiff's case in clear and concise language; 4th, a prayer for the specific relief to which the plaintiff considers himself entitled, but the prayer for general relief may be added; Ch. Ord. IX. The bill must also be divided into paragraphs, and each paragraph must be numbered; Ch. Ord., 13 April, 1859.

Q. 49.—What are the requisites of an answer ?

A.—An answer is to consist of a clear and concise statement of such defence or defences as the defendant may desire to make, Ch. Ord. XII., and must be divided into paragraphs, and each paragraph numbered; Ch. Ord., 13 April, 1859.

Q. 50.—What changes have the general orders made as to parties ?

A.—The practice of setting down a cause on an objection for want of parties merely is abolished; Ch. Ord. VI. It is provided that legatees or heirs may apply for a decree for administration of the real or personal estate of a deceased person, without joining co-legatees or co-heirs; also, that any one of several *cestuis que trust* may apply for a decree for the execution of the trusts or for the appointment of new trustees, without joining the others, and one person may move on behalf of himself and of all persons having the same interest, for the protection of property pending litigation, *ib.*

Q. 51.—What is the practice in this country and England respectively as to obtaining discovery ?

A.—In this country no bill can be filed for discovery merely, except in aid of the prosecution or defence of an action at law; Ch. Ord. IX., s. 19. In England such a bill may be filed for the discovery of facts, deeds or writings, &c., and seeking no relief in consequence of the discovery; Mitford Eq. Pl., 64.

Q. 52.—Under what circumstances in equity is a demurrer proper ?

A.—Whenever any ground of defence is apparent on the face of the bill, either from matter contained in it or from defect in its frame or in the case made by it, the proper mode of defence is by demurrer; Mitford Eq. Pl., 128.

Q. 53.—What is the effect of a replication in equity, and when should it be filed?

A.—The effect of a replication in equity is, that immediately upon the filing thereof the cause is to be deemed to be completely at issue; such filing must be within one month after the filing of the last answer. Ch. Ord. XVIII.

Q. 54.—Classify the different kinds of bills in Chancery, and state how far they are affected by the general orders.

A.—They are as follows: I. Original bills, which relate to some matter not before litigated upon by the parties—such are (a) those praying relief, as: 1, ordinary original bills praying the decree touching some right claimed by the plaintiff; 2, bills of interpleader; 3, bills of *certiorari*, but such bills are in effect abolished by U. C. Con. St., c. 15, §. 57, which provides for the removal of equity claims from the County Court to the Court of Chancery by a summary application on motion or petition supported by affidavit: (b) those not praying relief, as: 1, bills to perpetuate the testimony of witnesses; 2, bills for the discovery of facts, deeds, writings or other things in the knowledge, custody, or power of the defendant. II. Bills not original, where a suit is imperfect in its frame or becomes so by accident before its end has been obtained: such are: 1, supplemental bills which are merely an addition to the original; 2, bills of revivor; 3, bills of revivor and supplement, which continue a suit upon abatement and remedy defects. III. Bills in the nature of original bills: such are: 1, cross bills; 2, bills of review; 3, bills in the nature of bills of review; 4, bills to impeach decrees for fraud; 5, bills to suspend or avoid a decree; 6, bills to carry decrees into execution; 7, bills in the nature of bills of revivor; 8, bills in the nature of supplemental bills. The general orders have abolished supplemental bills, bills of revivor, bills of revivor and supplement, bills in the nature of bills of revivor; bills in the nature of supplemental bills, and substitutes therefor motions to amend, supported by affidavits; bills of review, bills in the nature of bills of review, bills to impeach decrees for fraud, bills to suspend or avoid decree; bills to carry decrees into execution are abolished, and in their place the general orders substitute petitions. Where a suit abates before decree it may be revised on motion: but where it abates after decree, then by petition. Mitford Ch. Pl. 35; Ch. Ord. IX, s. 14—18.

Q. 55.—What is an order for the production of documents, and the effect of it?

A.—It is an order that the party against whom it is obtained do, within four days after service, produce and leave with the Registrar all deeds, books, papers, writings and documents in his possession or control, relating to the matters in question in the cause; the effect of the order is to compel the party to shew the other side upon what documents his case rests.

Q. 56.—By what process can subsequent incumbrancers obtain a decree for sale when a prior incumbrancer prays for a decree of foreclosure?

A.—By asking for a sale at the hearing, and by paying £20 into court within fourteen days, to meet the expenses of the sale; or by taking the conduct of the sale at their own expense.

Q. 57.—By what process is a guardian *ad litem* appointed?

A.—He is appointed by order of the court upon application of the plaintiff at any time after bill filed; Ch. Ord. XIII, s. 5; or the party desirous of appointing a guardian for him to defend a suit may go before a judge or master with such guardian, and the judge or master may appoint such guardian if he shall think fit; Ord. 6th June, 1853.

Q. 58.—How is a decree registered?

A.—By a certificate thereof issued by the Registrar under the seal of the court.

Q. 59.—Give the provisions of the provincial statute which is commonly known as the "dormant equities act."

A.—It provides that no title or interest in real estate which is valid at law, shall be disturbed or otherwise affected in equity, by reason of any matter or upon any ground which arose before the fourth day of March, one thousand eight hundred and thirty-seven, or for the purpose of giving effect to any equitable claim, interest or estate, which arose before the said date, unless there has been actual or positive fraud in the party whose title is sought to be disturbed or affected: in regard to any other equitable claim or right which may have arisen before that date, the court shall have authority (subject to appeal,) to make such decree as may appear to the court just and reasonable, under all the circumstances of the particular case, provided that the suit be brought within twenty years from the time when the right or claim arose; and no further

time shall be allowed for bringing any such suit, notwithstanding any disability of the claimant or of any one through whom his right accrued. 18 V., c. 124, ss. 1, 2—U. C. Con. St. c. 12, ss. 59, 60.

Q. 60.—How are corporations, foreign and domestic, served with process in chancery?

A.—A foreign corporation having an agency office within Upper Canada may be served at such agency; but if it has no such agency there, then at the head office without Upper Canada, after an order for that purpose. A domestic corporation, or one whose head office is within Upper Canada, must be served at such head office. Ch. Ord. 17th March, 1857.

Q. 61.—What effect has the receipt of rents and profits during the progress of a foreclosure suit before the final order is obtained?

A.—If the rents and profits are received after the master's report, then the plaintiff must take a new account, and give credit for the moneys so received, and which he will receive up to the day appointed for payment.

Q. 62.—When some instalments only of the mortgage nearly are due can a foreclosure suit be instituted?

A.—Upon default in payment by a mortgagor of any instalment of, or interest on the mortgage money, the mortgagee has a right to call in the whole amount secured by the mortgage. See *Cameron v. McRae*, 3 Grant, 311; *Sparks v. Redhead*, *ibid*.

Q. 63.—When two or more mortgages become united in one mortgagee, can the mortgagor redeem one or both at his option? and give reasons for your opinion.

A.—It is equity that the creditor shall not be deprived of his pledge without payment of all sums of money due to him from his debtor which form a general or specific lien on the land; and therefore if the mortgagee advance further sums of money to the mortgagor expressly by way of further charge (forming a specific lien,) or on a judgment now forming an actual charge (or a general lien,) neither the mortgagor nor, generally speaking, any one claiming under him shall be allowed to redeem without paying the full amount. Coote on Mortgages, p. 389.

Q. 64.—Does the dismissal of a bill for want of prosecution operate as a bar to another suit of the same sort?

A.—The dismissal of a bill for want of prosecution cannot be

set up in bar to another suit. See Tayl. Ch. Ord., 105.

Q. 65.—What is the practice in proceeding under a reference to the master as to title?

A.—When an enquiry into title has been directed by the court, the vendor is to deliver an abstract of the title to the purchaser, and if the latter do not object to the title, and obtain and serve an appointment or warrant from the judge or master to consider the same, within fourteen days after the delivery of the abstract, he is to be deemed to have accepted the title; at the time of serving the appointment or warrant the purchaser must deliver to the vendor a written notice of the objections to the title; at the time appointed a duplicate of such notice is to be brought into the judge's chambers or master's office by the objecting party, and such objections are to be argued before the judge or master, who is to allow or disallow them; and such allowance or disallowance may be the subject of appeal by way of motion to the court; the judge or master is to make no report upon the title, but is merely to mark the objections allowed or disallowed as the case may be; such objections so marked are to be filed, and such allowance or disallowance is to stand absolutely confirmed, unless appealed from within fourteen days after filing. Ch. Ord. XXXVI., s. 12.

Q. 66.—When a person, not an infant nor of unsound mind, has been served with an office copy of the bill, within the jurisdiction, but not personally; in what manner must an order *pro confesso* be applied for against him?

A.—The plaintiff must serve on the defendant personally, or by his solicitor, if he have one, a notice of motion to be made on some day not less than three weeks after service; but where a solicitor has accepted service of an office copy of the bill for the defendant two days notice is sufficient, and may be served upon the solicitor; *Ross v. Hayes*, 6 Grant, 277. Upon giving such notice he may in due time apply to the court for an order *pro confesso*, unless the defendant has in the meantime put in his answer. Ch. Ord. XIII. s. 3. If substituted service has been ordered then on the expiration of the time limited by the order, the plaintiff may move *ex parte* for the order *pro confesso*.

Q. 67.—Can a decree be obtained before the time for answering has expired? State the practice in such cases.

A.—Where it can be made to appear to the court that it will

be conducive to the ends of justice to permit a motion for decree before the time for answering has expired, the plaintiff may apply to the court, *ex parte*, for that purpose, at any time after the bill has been filed, and the court, if it thinks fit, may order the same accordingly. When such permission is granted, the court is to give such directions as to service of the notice of motion and the filing of affidavits, as it may deem expedient. Ch. Ord. XVII.

Q. 68.—What is the difference between a demurrer at law and in equity in point of pleading?

A.—At law the demurrer consists of a statement that the count or other pleading is "bad in substance." In equity it is a statement that the plaintiff shows no ground whereon the court can make a decree, and demands the judgment of the court whether the defendant shall be compelled to make answer to the plaintiffs bill or to some certain part of it.

Q. 69.—Can the silence of the answer as to any statement in the bill be construed into an implied admission of its truth?

A.—The silence of the answer as to any statement of the bill is not to be construed into an implied admission of its truth. Ch. Ord. XII. s. 1.

Q. 70.—What is the effect of admissions made in an answer by one defendant as regards his co-defendant?

A.—They may be read by the plaintiff against the co-defendant if notice be given to such co-defendant of the intention of the plaintiff to read them. Smith's Ch. Pr. 390.

Q. 71.—What effect has an unproved allegation of fraud in the bill, on the costs of the suit, when the plaintiff succeeds generally?

A.—The plaintiff has to pay his own costs.

Q. 72.—How is a bill taken *pro confesso* against a married woman?

A.—If the defendant be a married woman, an order that she shall answer separate from her husband must first be served, and the time within which she is to answer must be expressed in the order, before a bill can be taken *pro confesso* against her; see *Miller v. Gordon*, 5 Grant, 134.

Q. 73.—Give briefly the statutory provisions affecting the exercise of the jurisdiction of the Court of Chancery in this province.

A.—The statutory provisions are: that the Court of Chancery

shall have like jurisdiction and power as by the laws of England were at the time of passing of Stat. 7 W. 4, c. 2, s. 2,—4 March, 1837, possessed by the Court of Chancery in England—1, in all matters of fraud and accident; 2, in all matters relating to trusts, executors and administrators, co-partnership and account, mortgages, awards, dower, infants, idiots, lunatics and their estates; 3, also to stay waste; 4, to compel the specific performance of agreements; 5, to compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same; 6, to prevent multiplicity of suits; 7, to stay proceedings in a court of law prosecuted against equity and good conscience; 8, to decree the issue of letters patent from the crown to rightful claimants; 9, to repeal and avoid letters patent issued erroneously or by mistake or improvidently or through fraud; 10, and generally the like jurisdiction and power as the Court of Chancery in England possessed on the tenth day of June, 1857, as a court of equity, to administer justice in all cases in which there exists no adequate remedy at law. The various enactments are consolidated by U. C. Con. St. c. 12, s. 26.

Q. 74.—When does publication pass?

A.—When issue has been joined in a cause three weeks before the commencement of the next ensuing examination term, at the place where the venue has been laid, publication is to pass at the close of such term: and when issue has been joined less than three weeks before the commencement of the next ensuing examination term at the place where the venue has been laid, publication is to pass at the close of the following term. Ch. Ord. II., s. 5, 23 Decr. 1857.

Q. 75.—When may a statute be relied upon as a ground of demurrer, in equity, and when not?

A.—When the bill shews the omission of requirements made necessary by the statute to be complied with to entitle a party to relief. But such can not be relied upon when a charge of fraud or trust or part performance is pleaded.

Q. 76.—What are valid objections to discovery?

A.—Want of jurisdiction; want of interest; no privity between plaintiff and defendant; that discovery not material; that it would subject the defendant to penalties, forfeiture, criminal prosecution, or hazard of title, Mitford Eq. Pl. 220.

Q. 77.—When will a writ of arrest be granted?

A.—When the party appearing for the writ has a cause of suit to at least \$100, and by affidavit shows such facts and circumstances as will satisfy a judge that there is good and probable cause for believing that the person against whom the writ is to be issued, unless he be forthwith apprehended, is about to quit Canada with intent to defraud his creditors generally or such party particularly. U. C. Con. St. c. 24, s. 8.

Q. 78.—When may the court proceed without a personal representative?

A.—When there is no legal representative, and the interest of the deceased defendant in the matter in question in the suit is of little consequence, and where there is difficulty in obtaining representation to his estate. See Ch. Ord. XXX.; Daniel's Ch. Prac. Headlam's Ed. 1158.

Q. 79.—In what cases will a receiver be granted?

A.—When it does not appear reasonable that either party to the suit should be in receipt of the rents, issues or profits of land or other things in question in the cause, the court will appoint an indifferent person between the parties to be receiver. Smith's Ch. Pr. 607.

Q. 80.—What old forms of bills have the general orders abolished?

A.—Supplemental bills, bills of revivor, bills of review and supplement, original bills in the nature of bills of revivor and original bills in the nature of supplemental bills, bills of review, bills in the nature of bills of review, bills to impeach the decree on the ground of fraud, bills to suspend the operation of decrees, bills to carry decrees into operation. Ch. Ord. XIX., XX., XXI.

Q. 81.—Sketch the ordinary proceedings in a suit in Chancery, from the beginning to its termination?

A.—The plaintiff files his bill setting forth his claim to the assistance of the court; makes an office copy of the bill for each defendant, that is a copy of the bill on file, certified to by the registrar and stamped with the seal of the court. He then serves each defendant with such office copy bill. At the end of the time for answering, if the defendants have not answered, the plaintiff takes the bill *pro confesso* and sets the cause down to be heard, without any evidence save the bill, and on the hearing obtains a decree,

giving the relief to which the plaintiff shews himself to be entitled. If the defendants answer the bill, not setting out a case different from that in the plaintiff's bill, the cause may be heard on bill and answer. But if there is a conflict as to facts, then the plaintiff after the last answer is filed, files a replication, sets the cause down for the examination of witnesses at the place where the venue is laid; the evidence on both sides is then taken and the cause may then be set down for argument during the hearing term, and upon such argument the court makes such a decree as the parties are entitled to. If there is a reference to the master, the party having the carriage of the reference must take the decree into the master's office within fourteen days, or any other party to the suit may obtain the reference. If the master's report has to go before the court, the original is filed, and the cause set down to be heard on further directions at the end of fourteen days from filing the report. Upon the hearing on further directions, the court finally adjudicates upon the rights of all parties.

Q. 82.—How must a defence in equity be set up? and distinguish between the present and the former practice.

A.—By demurrer or answer, or demurrer to part and answer to remainder of the plaintiff's bill. Pleas were allowed under the former practice; but since the orders of 1853, pleas are abolished.

Q. 83.—What jurisdiction has the court of Chancery over infants and their estates?

A.—The Court of Chancery has power (concurrent with the Superior Courts of Law) to compel a father or guardian of an infant to allow access by the mother to the infant, and if the infant be under twelve years of age, to order delivery up of such infant to the mother; U. C. Con. St. c. 74 s. 8. The court has power, when of opinion that a lease or disposition of real estate of an infant is necessary or proper for his maintenance and education, or when the property is exposed to dilapidation or depreciation in value and the interest of the infant requires it, to order the sale or lease of the estate or any part of it to be made under the direction of the court or one of its officers, or by the guardian of the infant, or by any other person appointed for that purpose, in such manner as may be deemed expedient, and may order the infant to convey the estate; but no such sale or lease can be made against the provisions of any will or conveyance by which the estate has been

devised or granted to the infant or for his use; and if the infant be above seven years of age, his consent is requisite. The court has power to apply the monies arising from such sale. The court also has power to make a composition in cases of dower, to which the real estate of an infant is subject. U. C. Con. St. c. 12, ss. 49-57.

Q. 84.—What is the affidavit of production, and what should it contain?

A.—It is the affidavit to be made by a party who has been served with an order for the production of documents; Ch. Ord. XX. sec. 2. It should contain statements of the documents in the deponent's possession relating to the matters in controversy, the documents which have been in his possession, and the time when they were last in his possession, and what has become of them, and a statement of those which he objects to produce; and should also contain a statement that the deponent has not nor has had any documents in his possession other than those named.

Q. 85.—In what cases will the Court of Chancery still commit by the writ of attachment?

A.—For breach of injunctions, and disobedience to orders or decrees directing an act or duty to be performed which are not in the nature of orders or decrees for the payment of money or costs; or for interfering with the process of the court, and for other contempts.

Q. 86.—In what cases is a guardian *ad litem* necessary?

A.—When infants, or persons of unsound mind, not so found by inquisition, are made parties to suits after decree, or are served with a notice of motion under Order XV. of the general orders of June, 1853, guardians *ad litem* are necessary to be appointed for them. Ch. Ord., 8th Nov., 1856.

Q. 87.—What are the statutory limitations as to suits in equity?

A.—U. C. Con. St. c. 88, s. 31, enacts that no suit in equity shall be brought for any land or rent but within twenty years from the time when the right accrues. [See also answer to question 59.]

Q. 88.—Mention the different statutory enactments in relation to the rights of mortgagee and mortgagor in respect of the mortgaged estate.

A.—See answer to Q. 3, on Coote on Mortgages, p. 149, *ante*.

Q. 89.—When should a demurrer, and not an answer, be filed?

A.—When any ground of defence is apparent on the bill itself,

either from matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of defence is by demurrer. Mitford's Eq. Pl. 128.

Q. 90.—What is the doctrine of representation in equity pleading?

A.—All persons materially interested in the subject matter of the litigation, ought generally to be made parties to the suit, so that the court may do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigations may be prevented; Mitford Eq. Pl. 190. But this rule is qualified, and when parties are out of the jurisdiction, or are too numerous to be made plaintiffs, the court will allow one or a few having the same interest to sue on behalf of themselves and of all others entitled to the relief prayed for.

Q. 91.—State the various modes by which a plaintiff may bring his cause to hearing.

A.—By hearing *pro confesso*; bill and answer motion for decree; and upon evidence taken in court during the regular terms.

Q. 92.—What is requisite in an answer setting up the plea of a purchase for valuable consideration without notice?

A.—The defendant must aver that the person who conveyed or mortgaged to him was seised in fee, or pretended to be so seised, and was in possession, if the conveyance purported an immediate transfer of the possession of the time; that the conveyance was duly executed; what the consideration was, and the actual payment thereof. He must also deny notice of the plaintiff's title or claim previous to the execution of the deed and payment of the consideration. If peculiar circumstances of fraud or notice are charged, they should be denied as specially and particularly as charged in the bill. Story's Eq. Pl. 805.

Q. 93.—When may a defendant obtain relief from a plaintiff without filing a cross-bill?

A.—Where the original bill is for specific performance, and the defendant sets up and proves an agreement different from that insisted on by the plaintiff, and submits to perform the same, the court will decree the performance of the contract as set up by the defendant. Story's Eq. Plead. § 394.

Q. 94.—How is a decree in equity enforced ?

A.—By orders nisi and absolute, writs of attachment and sequestration. If for the payment of money, then by writs of *fi. fa.* goods and chattels, writs of *fi. fa.* lands, and writs of sequestration.

Q. 95.—What is the object of enrolling a decree, and how is it done ?

A.—To enable the party objecting to the decree to appeal to the Court of Error and Appeal. The enrolment of the decree is done thus: the registrar, at the instance of any party to the cause, attaches together the bill, pleadings and other proceedings in the cause with a fair copy of the decree or decretal order annexed, signed by the chancellor, and countersigned by the registrar; and the papers and proceedings so annexed and signed are to remain of record in the registrar's office, and such filing is to be deemed and taken to be an enrolment of the decree for all purposes. Ch. Ord. XLIII.

Q. 96.—May a defendant in equity, when under examination at the instance of the opposite party, enter into any facts material to his own defence, or to what extent is his examination on his own behalf limited ?

A.—He cannot enter into any facts material to his own defence. His examination is limited to an explanation of any matters or things referred to or brought out in his examination in chief.

Q. 97.—In what cases will equity assume jurisdiction without requiring a bill to be filed ?

A.—In the administration of the estates of deceased persons. Ch. Ord. XV.

Q. 98.—What statutory provisions exist as to partition ?

A.—U. C. Con. St. c. 86, s. 3, enacts that every partition of lands voluntarily made must be made by deed. The same Act, ss. 4 *et seq.*, enacts that joint tenants, tenants in common, and co-parceners may be compelled to make partition of the lands held by them as such, upon the petition of any one of them or his agent, or guardian if a minor, to any of the superior courts of law and equity; or, where the lands are situate in one county only, to the county court of such county. The same Act, s. 40, gives the Court of Chancery power to make partition as the Court of Chancery in England has jurisdiction. See also U. C. Con. St. c. 12, ss. 45–48.

Q. 99.—In what cases is it necessary to make all the *cestui que*

trust parties to a bill in Chancery, notwithstanding the recent orders?

A.—If the bill is filed to set aside a settlement, or if the trustees have disclaimed, the *cestuis que trust* must be made parties.

Q. 100.—Give a definition of multifariousness.

A.—By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters and thereby confounding them; as, for example, the uniting of several matters of a distinct and independent nature against several defendants in the same bill; Story's Eq. Plead., § 271.

Q. 101.—What is the practice of bringing defended and undefended causes to a hearing?

A.—A defended issue may be brought to a hearing by way of motion for decree on any court day, or by an examination of witnesses, and a hearing of the cause during the regular hearing terms upon the evidence so taken. An undefended issue may be set down to be heard on any court day, without evidence save the bill and the order *pro confesso*.

Q. 102.—What jurisdiction has the Court of Chancery in Upper Canada with respect to wills?

A.—The Court of Chancery has jurisdiction to try the validity of last wills and testaments, whether respecting real or personal estate, and to pronounce such wills to be void for fraud and undue influence or otherwise. 12 V. c. 64, s. 10—U. C. Con. St. c. 12, s. 28.

Q. 103.—Under what circumstances and on what terms will the time fixed for payment of mortgage money be delayed?

A.—If the whole mortgage money is not due, the mortgagor may apply to the court before decree for dismissal of the bill on payment into court of the principal, interest and costs; if after decree, then that on payment of principal, interest and costs then due, all the proceedings be stayed. Or if the whole amount is due, if the mortgagor applies to the court shewing good grounds for extending the time, the court will grant such indulgence on payment of costs.

Q. 104.—State the process for obtaining the usual administration order.

A.—Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next of kin, or some one of the next

of kin, or the heir or the devisee interested under the will of any deceased person, may apply to the court upon motion, without bill filed or any other preliminary proceeding, for an order for the administration of the estate real or personal of such deceased person. The notice of motion in such case must be served upon the executor or administrator, as the case may be, of such deceased person, at least fourteen days before the day fixed for hearing the application. Ch. Ord. XV.

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THE
STUDENT'S GUIDE:

A COLLECTION OF

DIRECTIONS AND FORMS FOR THE USE OF STUDENTS-AT-LAW
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THE STUDENT'S GUIDE.

PART I.

Examination of candidates for admission on the Books of the Society as Students-at-law.

No person may be admitted on the Books of the Society as a student-at-law who is not of the full age of sixteen years.

Notice of the intention of any person to apply for admission as a student-at-law, signed by a benchers, and containing the name, addition and family residence of the candidate, (*Form No. 1.*) must be delivered to the Secretary of the Society, at his office in Osgoode Hall, on some day in the term next preceding the term in which he seeks admission. Upon receiving such notice the secretary is entitled to a fee of 5s.

Each candidate must on some convenient day, previous to the examination day, report himself to the sub-treasurer at Osgoode Hall, and deposit with him his presentation and the amount of fees payable on admission, together with his petition for admission. The presentation (*Form No. 2.*) is an instrument in writing, signed by a member of the Upper Canada Bar, presenting the candidate to the Examining Committee. The fees payable by candidates for admission as students-at-law amount to £11 12s. 6d.

Notice of the day on which candidates are required to attend for examination is transmitted to each candidate; if none be so transmitted, the candidate must attend at Osgoode Hall on the Tuesday in the last week but one of the vacation, at ten o'clock A.M., at which time the examination commences. The examination is conducted in the Convocation Chamber at Osgoode Hall, by the Examiner for Matriculation, in the presence of a Committee of Benchers appointed for the purpose.

The examination of candidates is divided into three classes—the University Class, the Senior Class, and the Junior Class.

Candidates in the former class must be graduates of a University entitled to confer degrees, and established in some part of Her Majesty's dominions; and are examined separately from other candidates in the following books:—

In HOMER,—B. 1 of Iliad.

In LUCIAN,—Charon, Life or Dream of Lucian and Timon.

In HORACE,—the Odes.

In MATHEMATICS or METAPHYSICS,—At the option of the candidate, according to the following courses respectively:—

Mathematics,—Euclid, Bb. I., II., III., IV., and VI.; or Legendre's Geometrie, Bb. I., II., III., and IV.; Hind's Algebra to the end of Simultaneous Equations.

Metaphysics,—Walker and Whateley's Logic, and Locke's Essay on the Human Understanding.

In HERSCHELL'S ASTRONOMY,—Ch. I., III., IV., and V.

In ANCIENT and MODERN GEOGRAPHY and HISTORY,—Such works as the candidates may have read.

Candidates for admission in this class or in the Senior Class, who do not pass therefor, if not rejected in toto, are passed in in the Junior Class.

Candidates for admission in the Senior Class are examined in the same books as candidates for admission in the University Class.

Candidates for admission in the Junior Class are examined in the following books:—

In HORACE,—Bb. I. and III. of the Odes.

In MATHEMATICS,—Euclid, Bb. I., II., and III., or Legendre's Geometrie, by Davies, Bb. I. and III. with Problems.

In ENGLISH HISTORY and MODERN GEOGRAPHY,—Such works as the candidates may have read.

The forms required may be obtained upon application to the Secretary or Steward at Osgoode Hall.

1. Notice of application for admission.

LAW SOCIETY OF UPPER CANADA, OSGOODE HALL, TO WIT:

Mr. A. B. [*a Bench*er] gives notice that C. D. [*names in full, no initials*], of _____, in the County of _____, in this Province,

gentleman, son of E. D., of the same place, *gentleman*, [or as the case may be] will, next Term, be presented to the Benchers of this Society, in Convocation, for the purpose of being entered of, and admitted into, the Society as a Student of the Laws.

2. Presentation for admission.

LAW SOCIETY OF UPPER CANADA, OSGOODE HALL, TO WIT :

To the Benchers of the Law Society of Upper Canada, in Convocation :

GENTLEMEN,—I hereby present to the Examining Committee and to the Convocation, C. D. [names in full, no initials] of in the county of , in this Province, gentleman, son of E. D., of the same place, *gentleman*, [or as the case may be] for the purpose of his being examined and entered of, and admitted into, the Society as a Student of the Laws.

G. H.

[Some member of the Society, of the degree of
Barrister at Law.]

3. Petition for admission as Student at Law.

(Forms of petition are given by the Secretary to the candidates to be filled up by them.)

LAW SOCIETY OF UPPER CANADA, OSGOODE HALL, TO WIT :

To the Benchers of the Law Society of Upper Canada, in Convocation.

The petition of C. D., [names at length, no initials] f in the county of , in this Province, gentleman, son of E. D., of the same place, *gentleman*, [or as the case may be] most respectfully sheweth,

That your petitioner is of the full age of years ;

That he has received an education which he trusts sufficiently qualifies him to commence the study of the profession of the law ;

That he received his education at the *University of Toronto*, [or at the County Grammar School at , in the county of ,

or at the school of J. S., at _____, in the county of _____, or
as the case may be, being as full and particular as possible];

That he has been instructed in the following branches of learning,
that is to say, in _____, [as the case may be];

That in the course of such instruction he has read the following
books, that is to say, _____, [as the case may be];

That your petitioner is desirous of becoming a member of the
Law Society of Upper Canada, and of being entered thereof as a
student of the laws;

Your petitioner therefore most respectfully prays that, his quali-
fications being first examined and found sufficient, according to the
Rules of the Society, and Standing Orders of Convocation in that
behalf, he may be admitted and entered accordingly; and he doth
hereby undertake and promise that he will well, faithfully and
truly submit and conform himself to, and obey, observe, perform,
fulfil and keep all the rules, resolutions, orders and regulations of
the Society, during such time as he shall continue on the books of
the said Society as a member thereof.

C. D.

Witness: }
G. H. } *Hilary Term, 25 Vic., [or as the case may be.]*

Candidates passed in the University Class are passed according
to their rank, if graduates of the same University; or according
to the dates of their diplomas or degrees, if graduates of different
Universities. Candidates in the Senior or Junior Class are classed
according to their merits.

Attending Lectures.

Students at law, previous to application for call to the Bar, must
attend four courses of lectures at Osgoode Hall, each course last-
ing for a Term. They are required to attend every lecture of each
course, of which there are two each day, unless excused by Convoca-
tion during the same Term, upon the ground of sickness or other
unavoidable cause, from attendance for one or more lectures; but no
excuse can be allowed for non-attendance on more than three lec-
ture days of the Term. The Terms kept need not be consecutive.

Upon the last day of the Term, the student receives from the lec-

turer a certificate of his attendance, which he must exhibit or transmit to the Secretary, who keeps a record of the students who attend lectures.

Examination of Candidates for Call to the Bar.

No person can be called to the Bar, unless he be of the full age of twenty-one years.

The following persons may be called to the Bar: (U. C. Con. St., c. 84.)

1. Any person who has entered the Law Society, and has been standing on the books thereof for five years, and has conformed himself to the rules of the Society;

2. Any person who has been standing on the books of the Society for three years, and has conformed himself to its rules, and who, before entering the Society (see 23 V., c. 47) has taken a degree in arts or law in any of the Universities of the United Kingdom of Great Britain and Ireland, or in any University or College in Canada, having power to grant degrees;

3. Any person who has been duly called to the Bar of any of Her Majesty's Superior Courts in England, Scotland or Ireland, not being courts of merely local jurisdiction; and

4. Any person who has been duly called to the Bar of any of Her Majesty's Superior Courts in any of Her Majesty's Provinces in North America, in which the same privilege would be extended to Barristers from Upper Canada, and who produces sufficient evidence of such call, and testimonials of good character and conduct to the satisfaction of the Law Society.

Every candidate for call to the Bar must cause a written notice (*Form No. 4.*) of his intention to present himself for call, signed by a Benchet, to be given to the Secretary of his office in Osgoode Hall, some day in the term preceding that in which he intends so to present himself. With such notice the Secretary is entitled to a fee of 5s.

The candidate must be presented to the convocation by an instrument in writing, (*Form No. 6.*) signed by a Barrister of the Upper Canada Bar; and must execute a bond to the Society (*Form No. 8.*) in the penal sum of £100, with two responsible sureties,

to be approved of by the Treasurer, conditioned to pay fees, and to observe the rules and regulations of the Society.

The candidate must, at least one day before the examination day, report himself to the Sub-Treasurer at Osgoode Hall, and deposit with him his presentation and bond, and his petition for call, which petition must contain a statement of his age, of the day on which the period of his standing on the books, necessary to entitle him to be called to the Bar, expires, the terms he has kept, and the names of the persons under whose superintendence he has received his professional education (*Form No. 7.*) At the same time he must deposit with the Sub-Treasurer the fees payable on being called, which amount to £21 10s., and the Sub-Treasurer's receipt for such fees entitles the candidate to appear for examination.

The examinations for call to the Bar are divided into two classes, "call" simply and "call with honours;" and candidates for call with honours are considered as candidates for call simply, in the event of their not passing with honours. Candidates for call with honours must give to the Secretary notice in writing of their desire to be examined for honours, (*Form No. 5.*) at latest on the Saturday next but one before the term; and also must endorse their petitions for call with the words "for honours."

The examination is partly written and partly oral. The written examination of candidates for call with honours takes place on the Thursday and Friday of the week next preceding the term, and the written examination for call simply on the Thursday of the same week, commencing at ten o'clock A. M. each day. The answers to the written questions must be in writing, and must be delivered to the examiners (in whose presence they are to be framed) before three o'clock P. M. of the day on which the questions are given.

The written part of the examination is in the following books: For call simply:—Blackstone's Commentaries, vol. I., Addison on Contracts, Smith's Mercantile Law, Williams on Real Property, Story's Equity Jurisprudence, Stephen on Pleading, Taylor on Evidence, Byles on Bills; besides the Public Statutes relating to Upper Canada, and the Pleading and Practice of the Upper Canadian Courts of Law and Equity. And for call with honours, in addition to those books, in Russell on Crimes, Story on Partnership, Watkins' Principles of Conveyancing, Coote on Mortgages,

Dart on Vendors and Purchasers, Jarman on Wills, Story on the Conflict of Laws, and Justinian's Institutes.

The oral examination of candidates of both classes takes place on the first Monday in term.

The candidate, upon being called to the bar, must appear before the Convocation in a barrister's gown, for the purpose of his being presented to the Superior Courts. He may be so presented by any bencher present in court.

4. Notice of Presentation for Call.

LAW SOCIETY OF UPPER CANADA, OSGOODE HALL, TO WIT:

Mr. A. B. [*a bencher*] gives notice that C. D. [*names in full*], a member of this Society, now standing on the books as a student of the laws, and who has received his professional education under the superintendence of E. F. and G. H., members of this Society, of the degree of Barrister-at-Law [*or as the case may be*], will, next term, be presented to the benchers of this Society in Convocation, for the purpose of being called to the bar.

5. Notice that the Candidate desires to be examined for Honours.

LAW SOCIETY OF UPPER CANADA, OSGOODE HALL, TO WIT:

C. D. [*names in full*], who intends to present himself next term, to the benchers of this Society in Convocation for the purpose of being called to the bar, pursuant to notice to that effect given last term, gives notice that he desires to be examined for honours.

[*Date.*]

6. Presentation for Call.

LAW SOCIETY OF UPPER CANADA, OSGOODE HALL, TO WIT:

To the Benchers of the Law Society of Upper Canada, in Convocation.

GENTLEMEN,—I hereby present to the convocation, C. D.

[*names in full*], a member of this Society, now standing on the books as a student of the laws, and who has received his professional education under my superintendence, [*or, under the superintendence of A. B., a member of this Society of the degree of Barrister-at-Law, or, as the case may be*], for the purpose of his being called to the degree of Barrister-at-Law. G. H.

[*Some member of the Society, of the degree of Barrister-at-Law.*]

7. Petition for Call.

LAW SOCIETY OF UPPER CANADA, OSGOODE HALL, TO WIT :

To the Benchers of the Law Society of Upper Canada, in Convocation.

The petition of C. D. [*names in full*] of in the County of in this Province, gentleman, son of E. D. of the same place, gentleman, [*or as the case may be,*] and a member of this Society, now standing on the books as a Student of the Laws, most respectfully sheweth,

That your petitioner is of the full age of years ;

That he has received a professional education, which he trusts sufficiently qualifies him to commence the practice of the profession of the law ;

That he is of years standing on the books of the Society as a student of the laws ;

That he has received his professional education under the superintendence of a A. B., a member of this Society, of the degree of Barrister-at-Law, for the space of years, and of G. H. a member of this Society, of the degree of Barrister-at-Law, for the space of years [*or as the case may be*] ;

That he has since his admission into the Society, attended Lectures pursuant to the Rules of this Society in that behalf, that is to say,—the Term of *Hilary*, 186 , the Term of *Easter*, 186 , the Term of *Trinity*, 186 , and the Term of *Michaelmas*, 186 , [*as the case may be.*]

That he has since his admission into the Society pursued the following branches of general learning, that is to say, [*as the case may be*] ;

That in the course of such pursuit he has read the following works, that is to say, [*as the case may be*];

That he has particularly studied the following branches of the Law, that is to say, [*as the case may be*];

That in the course of such study he has read the following works, that is to say, [*as the case may be*];

That he is under no articles of clerkship of any kind whatsoever to any person or persons [*or as the case may be*];

And that he is desirous of being called to the degree of Barrister-at-Law.

Your petitioner therefore most respectfully prays that, his qualifications being first examined and found sufficient according to the Rules of the Society, and Standing Orders of Convocation in that behalf, he may be called to the said degree accordingly; and he doth hereby undertake and promise that he will well, faithfully and truly submit and conform himself to, obey, observe, perform, fulfil and keep all the rules, resolutions, orders and regulations of the said Society, during such time as he shall continue on the books of the said Society as a member thereof.

Witness: }
J. K. }

C. D.

Hilary Term, 25 Victoria [*or as the case may be.*]

8. Bond.

LAW SOCIETY OF UPPER CANADA, OSGOODE HALL, TO WIT:

KNOW ALL MEN by these presents that we, C. D., [*names in full*] of , in the county of , in this Province, gentleman, member of the Law Society of Upper Canada, now standing on the books of the said Society as a student of the laws, [*or Esquire, member of the Honourable Society of Lincoln's Inn, or as the case may be, or duly called to practise at the Bar of Her Majesty's Superior Courts in England, or at the Bar in Her Majesty's Province of Lower Canada (or as the case may be), in North America,*] and O. P., of , gentleman, and R. S., of , gentleman, are jointly and severally held and firmly bound to the Law Society of Upper Canada in the penal sum of one hundred pounds

of lawful money of Upper Canada, to be paid to the Law Society of Upper Canada aforesaid; for which payment to be well and truly made we bind ourselves, and each of us binds himself, our, and each and every of our heirs, executors and administrators firmly by these presents. Sealed with our seals. Dated this day of _____, in the _____ year of Her Majesty's reign, and in the year of our Lord one thousand eight hundred and sixty _____.

The condition of this obligation is such, that if the above bounden C. D. shall and will well and truly pay, or cause to be paid, to the Law Society of Upper Canada aforesaid, all such fees and dues of what nature or kind soever, as are now due or payable by or from him to the said Society, by or under any Statute or by any Rule, Resolution, Order or Regulation of the said Society, passed by the said Society, or by the Benchers thereof, with the approbation of the Judges of the Province, as Visitors of the said Society, or which shall or may hereafter become due or payable by or from him to the said Society, under the same, or under any other Statute or by any other Rule, Resolution, Order or Regulation to be passed by the Benchers of the said Society in Convocation, with such approbation as aforesaid; and also do and shall moreover well, faithfully and truly obey, observe, perform, fulfil and keep all the Rules, Resolutions, Orders and Regulations of the said Society, passed, as aforesaid, and now in force, or hereafter to be passed, as aforesaid, during such time as he shall continue on the books of the said Society as a member thereof—then this obligation shall be void, otherwise shall be and remain in full force, virtue and effect.

Sealed and delivered }
in the presence of }
A. B. }

C. D. (L. S.)
O. P. (L. S.)
R. S. (L. S.)

9. Certificate on Bond.

LAW SOCIETY OF UPPER CANADA, OSGOODE HALL, TO WIT:

These are to certify that we, the subscribers hereunto, are well acquainted with the within named O. P. and R. S., and that they are freeholders of substance amply sufficient to secure the performance of the condition of the within bond.

J. S.
J. R.

PART II.

ARTICLED CLERKS.

The following persons may be admitted and enrolled as Attorneys and Solicitors (see U. C. Con. St. c. 35, s. 2):

1. Any person bound by contract in writing to a practising attorney or solicitor in Upper Canada to serve him, as his clerk for five years;

2. Any person bound by contract in writing to a practising attorney or solicitor in Upper Canada, to serve him as his clerk for three years, and who, before being so bound, has taken a degree in Arts or Law in any of the Universities of the United Kingdom of Great Britain and Ireland, or of this Province, having power to grant degrees; (*Note*.—Any clerk whose articles date before 1st March, 1860, may be admitted though he took his degree subsequently). See 23 V. c. 48.

3. Any person bound by contract in writing to a practising attorney or solicitor in Upper Canada to serve him as his clerk for one year, having been called to the Bar of Upper Canada, or to the Bar of any of Her Majesty's Superior Courts in England, Scotland, or Ireland, not having merely local jurisdiction;

4. Any person bound by contract in writing to a practising attorney or solicitor in Upper Canada to serve him as his clerk for one year, who has been duly and lawfully sworn, admitted and enrolled an attorney or solicitor of Her Majesty's High Court of Chancery, or Court of Queen's Bench, Common Pleas or Exchequer, in England or Ireland, or who has been writer to the signet or solicitor in the Supreme Courts in Scotland.

5. Any attorney or solicitor of any of Her Majesty's Superior Courts of Law or Equity in any of Her Majesty's Colonies wherein the common law of England is the common law of the land, and who has been bound by contract in writing to a practising attorney or solicitor in Upper Canada to serve him as his clerk for one year.

1. *Form of Articles of Clerkship.*

ARTICLES OF AGREEMENT made entered into and concluded on the day of in the year of our Lord one thousand eight hundred and sixty between A. B. of the of in the County of gentleman one of the attorneys of Her Majesty's Courts of Queen's Bench and Common Pleas at Toronto and a solicitor in the Court of Chancery for Upper Canada of the one part and C. D. (a) of the of in the County of gentleman and E. D. son of the said C. D. of the other part WITNESS that the said E. D. of his own free will and by and with the consent and approbation of the said C. D. hath put place and bound himself and by these presents doth put place and bind himself clerk to the said A. B. to serve him from the day of the date hereof for and during and until the full end and term of five years [*or three years or one year as the case may be*] from hence next ensuing and fully to be complete and ended AND the said C. D. doth hereby for himself his heirs executors and administrators covenant promise and agree to and with the said A. B. his executors administrators and assigns that the said E. D. shall and will well faithfully and diligently serve the said A. B. as his clerk in the business practice and employment of an attorney at law and solicitor in Chancery from the day of the date hereof for and during and unto the full end of the said term of *five* years AND that the said E. D. shall not at any time during such term cancel obliterate spoil destroy waste embezzle spend or make away with any of the books papers writings moneys stamps chattels or other property of the said A. B. his executors administrators or assigns or any of his clients or employers which shall be deposited in his hands or entrusted to his custody or possession or which shall come or be entrusted to the care custody or possession of the said E. D. AND that in case the said E. D. shall act contrary to the said last-mentioned covenant or if the said A. B. his executors administrators or assigns shall sustain or suffer any loss damage or prejudice by the misbehaviour neglect or improper conduct of the said E. D. the said C. D. his executors or administrators shall indemnify the said A. B. and make good and reimburse the said A. B. the amount or

(a) If the party to be bound be of age, a third person is seldom made party to the indenture, and if so, the form should be altered accordingly.

value thereof AND further that the said E. D. shall and will from time to time and at all times during the said term keep the secrets or the said A. B. and readily and cheerfully obey and execute his lawful and reasonable commands and shall not depart or absent himself from the service or employ of the said A. B. at any time during the said term without his consent first had and obtained but shall from time to time and at all times during the said term conduct himself with all due diligence honesty and propriety AND that the said C. D. his executors and administrators shall and will from time to time and at all times during the said term at his and their proper costs and charges find and provide the said E. D. with all and all manner of necessary and becoming apparel AND the said E. D. doth hereby for himself covenant promise and agree to and with the said A. B. his executors administrators and assigns that he the said E. D. shall and will well truly honestly and diligently serve the said A. B. at all times for and during the said term as a faithful clerk ought to do in all things whatsoever in the manner above specified

IN CONSIDERATION whereof and of the sum of dollars by the said C. D. to the said A. B. in hand well and truly paid at or before the sealing and delivery of these presents the receipt whereof the said A. B. doth hereby acknowledge he the said A. B. for himself his heirs executors and administrators doth covenant promise and agree to and with the said C. D. his executors and administrators by these presents that he the said A. B. shall and will accept and take the said E. D. as his clerk AND the said A. B. shall and will by the best ways and means he may or can and to the utmost of his skill and knowledge teach and instruct or cause to be taught and instructed the said E. D. in the said practice or profession of an attorney-at-law and solicitor in Chancery which he the said A. B. doth or shall at any time hereafter during the said term use or practice and also shall and will at the expiration of the said term use his best means and endeavours at the request costs and charges of the said C. D. and E. D. or either of them to cause and procure him the said E. D. to be admitted and sworn an attorney of Her Majesty's said courts of Queen's Bench and Common Pleas or either of them and a solicitor of the said Court of Chancery provided the said E. D. shall have well faithfully and diligently served his said intended clerkship AND the said A. B. covenants with the said C. D. and E. D. to pay to the said E. D.* for the first year of his

said clerkship the salary or sum of dollars for the second year the salary or sum of dollars for the third year the salary or sum of dollars for the fourth year the salary or sum of dollars and for the fifth year the salary or sum of dollars which several sums shall be payable on the day of in each year [*or if the salary is to be a yearly one from the* thus*—for each and every year of his said clerkship the salary or sum of dollars to be payable on the day of in each and every year] PROVIDED always and it is hereby expressly understood and agreed that such salary shall cease upon any determination of the said clerkship before the expiration of the said term and that in the case of the absence of the said E. D. for any space of time beyond *one month* during the said term a proportionate abatement shall be made of such salary IN WITNESS whereof the parties aforesaid have hereunto set their hands and seals the day and year first above-mentioned.

Signed, sealed, and
delivered in the
presence of
G. H. }

A. B. (L. s.)
C. D. (L. s.)
E. D. (L. s.)

2. A Shorter Form.

ARTICLES OF AGREEMENT made and entered into this day of in the year of our Lord 186 , between A. B. of gentleman one of the attorneys of Her Majesty's courts of Queen's Bench and Common Pleas at Toronto and a Solicitor of the Court of Chancery of the one part and C. D. of gentleman and E. D. his son of the other part WITNESS that the said E. D. of his own free will and with the consent and approbation of the said C. D. his father hath put placed and bound himself and doth hereby put place and bind himself clerk to the said A. B. to serve him from the date hereof for the term of five years [*or three years, or one year*] fully to be complete and ended AND the said C. D. for himself his executors and administrators hereby covenants with the said A. B. his executors administrators and assigns—that the said E. D. shall and will well and faithfully serve the said A. B. as his clerk in the profession of an attorney at law and solicitor in Chancery during the said term And that the said E. D. shall not at any

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time during the said term cancel destroy waste or embezzle any of the books papers writings moneys or other property of the said A. B. or any of his clients which may be deposited in his hands or entrusted to his care or to the care of the said E. D. And that he will indemnify and save harmless the said A. B. his executors administrators and assigns from any loss or damage which he may sustain by reason of any such cancellation destruction waste or embezzlement which may occur and that he will reimburse him the amount thereof And that the said E. D. shall and will during the said term keep the secrets of the said A. B. and readily obey his reasonable commands and shall not depart or absent himself from his said service without the consent of the said A. B. and that he will in all things conduct himself during the said term as a faithful clerk ought to do AND the said E. D. covenants with the said A. B. his executors administrators and assigns that he will well and faithfully serve him as his clerk during the said term IN CONSIDERATION whereof and of the sum of of lawful money of Canada by the said C. D. paid to the said A. B. the receipt whereof is hereby acknowledged the said A. B. for himself his executors and administrators covenants with the said C. D. his executors and administrators—that he will accept the said E. D. as his clerk And that he will instruct him in the knowledge and practice of the law in the said courts as he himself practises the same And will at the expiration of the said term at the request costs and charges of the said C. D. and E. D. use his best endeavours to procure the said E. D. to be admitted and sworn an attorney and solicitor of the said courts respectively provided the said E. D. shall have well and faithfully served his said intended clerkship [*here insert a covenant for payment of salary, if required*] In witness &c., (as in Form No. 1.)

3. Assignment of Articles.

THIS INDENTURE made the day of in the year of our Lord one thousand eight hundred and sixty between A. B. of gentleman one of the attorneys &c [*as in Form No. 1*] of the first part—C. D. of gentleman and E. D. of son of the said C. D. of the second part—and G. H. of , gentle-

man, one of the attorneys &c., [as above,] of the third part. WHEREAS by articles of clerkship bearing date the day of , in the year of our Lord one thousand eight hundred and sixty , made between the said A. B. of the one part and the said C. D. and E. D. of the other part the said E. D. of his own free will and by and with the consent and approbation of the said C. D. did put place and bind himself clerk to the said A. B. to serve him as such from the day of the date thereof for and during and until the full end and term of *five* years from thence next ensuing and fully to be complete and ended AND WHEREAS the said E. D. hath served the said A. B. as his clerk from the day of the date of the said articles of clerkship to the day of the date of these presents being a period of years and months AND WHEREAS it has been agreed between the parties to these presents that the said A. B. shall assign to the said G. H. the said articles of clerkship and all benefit and advantage of him the said A. B. under or by virtue thereof or to be derived therefrom for all the residue now to come and unexpired of the said term of *five* years being a period or term of years and months AND WHEREAS also the said C. D. and E. D. have agreed that he the said E. D. shall put place and bind himself as clerk to the said G. H. for the said unexpired period or term of years and months NOW THEREFORE this indenture witnesseth that in consideration of the premises and of the sum of *five shillings* of lawful money of Canada to the said A. in hand paid by the said G. H. at or before the sealing and delivery of these presents the receipt whereof he doth hereby acknowledge and at the request and with the consent of the said C. D. and E. D. testified by their being parties to these presents and executing the same he the said A. B. hath assigned transferred and set over and by these presents doth assign transfer and set over unto the said G. H. all benefit and advantage interest claim and demand whatsoever of him the said A. B. under and by virtue of or to be derived from the said hereinbefore in part recited articles of clerkship and the service of him the said E. D. under or by virtue of the same TO HAVE AND TO HOLD the same and every part thereof unto the said G. H. his executors administrators and assigns AND this indenture further witnesseth that the said E. D. of his own free will and by and with the consent and approbation of the said C. D. hath put placed and

bound himself and by these presents doth put place and bind himself clerk to the said G. H. to serve him from the day of the date of these presents for and during the residue of the said term of *five* years that is to say for the said term of years and months fully to be complete and ended AND the said C. D. for himself his executors and administrators doth hereby covenant with the said G. H. his executors administrators and assigns in manner following that is to say &c. [*proceed as in Form No. 1.*] IN CONSIDERATION whereof and of the sum of *five shillings* of lawful money of Canada to the said G. H. in hand paid by the said C. D. and E. D. at or before the sealing and delivery of these presents the receipt whereof he doth hereby acknowledge he the said G. H. for himself his executors and administrators doth hereby covenant with the said C. D. his executors and administrators that he will accept and take him the said E. D. as his clerk and also &c [*proceed as in Form No. 1.*] IN WITNESS &c.

4. A Shorter Form.

THIS INDENTURE made the day of in the year of our Lord 186 between A. B. of gentleman one of the attorneys &c. [*as in Form No. 2*] of the first part C. D. of gentleman and E. D. his son of the second part and G. H. of gentleman one of the attorneys &c [*as in form No. 2*] of the third part WHEREAS by articles of clerkship bearing date the day of A. D. 186 made between the said A. B. of the one part and the said C. D. and E. D. of the other part the said E. D. of his own free will and with the consent of the said C. D. did put place and bind himself clerk to the said A. B. to serve him from the date thereof for the term of *five* years. AND WHEREAS the said C. D. has served under the said articles of clerkship for a period of years and months. AND WHEREAS it has been agreed by and between all the parties hereto that the said articles of clerkship and all the unexpired term and servitude of the said E. D. shall be assigned to the said G. H. and that the said E. D. shall put place and bind himself clerk to the said G. H. to serve him for the said unexpired term being a period of years and months. NOW THIS INDENTURE witnesseth that in consideration of the premises and of the sum of *five shillings* to

him in hand paid by the said G. H. the receipt whereof is hereby acknowledged he the said A. B. hath assigned transferred and set over and hereby doth assign transfer and set over unto the said G. H. all benefit and advantage of him the said A. B. under or by virtue of the said articles of clerkship and the service of the said E. D. for the said unexpired term thereunder TO HAVE AND TO HOLD the same unto the said G. H. his executors and administrators AND this indenture further WITNESSETH that the said E. D. of his own free will and with the consent of the said C. D. doth put place and bind himself clerk to the said G. H. to serve him for and during the said unexpired term of years and months fully to be complete and ended AND the said C. D. for himself his executors and administrators hereby covenants with the said G. H. his executors administrators and assigns that &c. [*proceed as in form No. 2.*] IN CONSIDERATION whereof and of the sum of *five shillings* to him in hand paid by the said C. D. and E. D. the receipt whereof he doth hereby acknowledge he the said G. H. for himself his executors and administrators covenants with the said C. D. his executors and administrators that he will accept the said E. D. as his clerk And &c. [*proceed as in Form No. 2.*] IN WITNESS &c.

The articles of clerkship must be filed within three months next after the date of execution, in the office of one of the clerks of the Crown and Pleas at Toronto, and with them must be filed an affidavit to be made or procured by the attorney or solicitor that he has been duly admitted, (*Form No. 5.*) and an affidavit that the contract was duly executed by the attorney or solicitor and the person bound to serve him as clerk, (*Form No. 6.*) which latter affidavit must specify the names of the attorney or solicitor and of the person so bound, and their places of abode respectively, and the day on which the contract was actually executed. (*b*) The clerk of the Crown and Pleas, upon such filing, is entitled to a fee of 2s. 6d. If such affidavit be not filed within three months from the date of the contract, the service of the clerk can be reckoned only from the date of such filing.

(*b*) It is usual to file two affidavits; but they may be included in one.

5. *Affidavit of Attorney.*

County of *Wellington* } I A. B. of the *Town of Guelph* in the
to wit : } County of *Wellington*, gentleman, make
oath and say ;

1. That the hereunto annexed articles of clerkship were [*or assignment of articles of clerkship was*] duly executed by me and by E. D. therein named on the day of in the year of our Lord 186 , being the day of the date thereof :

2. That I have been duly admitted an Attorney of Her Majesty's Courts of Queen's Bench and Common Pleas at Toronto, and a Solicitor of the Court of Chancery for Upper Canada ; and that I was on the said day and still am duly practising at the said *Town of Guelph*, and resident thereat ;

3. That at the said day the said E. D. was and still is residing at the said *Town of Guelph*.

Sworn before me at the *Town of Guelph*
in the County of *Wellington*, the
day of 186 . J. K.
A Commissioner in B. R. &c. for
the said County.

A. B.

6. *Affidavit of execution.*

County of } I G. H., of the of in the County of
to wit : } gentleman, make oath and say :

1. That I was present on the day of A. D. 186 , [*date of articles or assignment*] and saw the hereunto annexed articles of clerkship [*or, assignment of articles of clerkship*] duly executed, signed, sealed and delivered by the therein named A. B., C. D. and E. D. ; and that the name "G. H." subscribed as witness thereto is of the proper hand-writing of me this deponent :

2. That at the time of such execution the said A. B. resided at , and the said C. D. at .

Sworn, &c.

G. H.

An attorney cannot have more than four articulated clerks at one time. (c)

Service under Articles.

An articulated clerk must, during the term of his articles, be actually employed in the proper practice or business of an attorney or solicitor, by the attorney or solicitor to whom he is bound; or, with his consent, by his Toronto agent, for a part of the term not exceeding one year.

Such service must be an actual and continued service under the control of the attorney or solicitor, and in his business; *R. v. The Scriveners' Company*, 3 Q. B. 939; *Ex parte Hill*, 7 T. R. 450; *In re Hume*, 19 U. C. Q. B. 373. The clerk must not, except in his leisure hours, after he has completed his master's business, be employed in any other office or business; *Re Taylor*, 5 B. & Ald. 538; *Ex parte Llewellyn*, 2 Dowl. N. S. 701. In England, cases have occurred where the clerk has been prevented by long illness from serving regularly, and has nevertheless been admitted; *Ex parte Matthews*, 1 B. & Ad. 160; *Ex parte Hodge*, M. 1838, 2 Jur. 989.

If the service be insufficient for want of continued service, it is bad altogether, and new articles for the whole term must be entered into; *Ex parte Taylor*, 4 B. & C. 341. But *quære*, if our courts would not allow the portions of the time well served; *In re Hume*, *ubi sup.*

Bankruptcy or Death of Attorney or Solicitor.

The U. C. Con. St. c. 35, s. 14, provides a remedy in the event of the attorney or solicitor to whom a person is bound as clerk becoming bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or having been imprisoned for debt, remaining in prison for the space of twenty-one days before the expiration of the articles: it enacts that in such case, any of the Superior Courts

(c) Where there are two attorneys in partnership, each may have the full number of articulated clerks, provided none of the clerks be bound to them both,—which may be done; *Ex parte Bayley*, 9 B. & C. 691; 4 M. & R. 600.

of Law or Equity wherein such attorney or solicitor had been admitted to practise, may, upon the application of the clerk, order the contract of service to be discharged, or assigned to such person, upon such terms and in such manner as the court thinks fit.

The same Act, s. 15, enacts that if the attorney or solicitor, before the expiration of the articles, die, or discontinue practice, or if the contract be cancelled by the consent of the parties, or if the clerk be legally discharged by any rule or order of the court wherein such attorney or solicitor has been admitted, the clerk may be bound by another contract in writing to any other practising attorney or solicitor during the residue of the term of his service; and that service under such subsequent contract shall be deemed sufficient, provided an affidavit of execution thereof be duly made and filed as in ordinary cases, subject to the like regulations as in ordinary cases.

Attending Term.

Articled clerks must, during their term of service, attend the sittings of the Court of Queen's Bench or Common Pleas, or one of them, during at least two terms, and must comply with the regulations of the Law Society in that behalf.

They must attend every day on which the court sits during term, and are required to enter their names and subscribe a declaration of attendance in the Articled Clerk's Attendance Book of the court, pursuant to the rules of court: such entry is made every day. In case of absence during the term, on account of sickness or other unavoidable impediment, the clerk will be allowed his attendance upon satisfying the clerks of the Crown and Pleas of the courts by certificate of his medical attendant or otherwise to their satisfaction, that such sickness or impediment was the sole cause of his absence;—a certificate of this under the hands of the clerks of the Crown and Pleas must be left with the Secretary of the Law Society at the same time that the clerk leaves his petition and other papers before examination.

A certificate of such attendance may be obtained from the clerk of the Crown and Pleas of the Court which the articled clerk has attended, at any time after the term.

Examination for Certificate of Fitness.

At least fourteen days before the first day of the term in which he seeks admission, the candidate must leave with the Secretary of the Law Society his contract of service, and assignments thereof, if any, and an affidavit of execution thereof and of due service thereunder, and a certificate of his having attended the sittings of the court or courts during two terms; and in the case of a person who has taken a degree, a certificate of his having taken such degree, or a duly authenticated certified copy of such certificate.

The candidate must prove by the affidavits of himself and of the attorney or solicitor to whom he has been bound, or his agent, that he has actually served and been employed by such attorney or solicitor or agent (as to the latter for the term of one year only) during the whole time of his service, and in the manner required by law (*Forms Nos. 7 and 8*): such affidavits he must deliver to the Law Society upon his application to be examined.

If the contract of service, affidavit and assignment (if any), cannot be produced, upon application made to the Law Society at least fourteen days before the first day of the term in which the candidate seeks admission, the Society, on being satisfied of such fact, may in their discretion dispense with the production of them, or any of them; and the certificate of the Law Society of such dispensation will be sufficient in lieu of their production.

Candidates for admission in classes 3, 4 and 5 must publish in the *Canada Gazette*, at least two months previous, their intention to apply for admission to the Court of Chancery, Queen's Bench, or Common Pleas (as the case may be) in the next ensuing term of such court; and persons other than those who have been called to the Bar of Upper Canada must also, at least fourteen days before the first day of the term, leave with the Secretary of the Law Society,—1, in the case of a Barrister, not being a Barrister of Upper Canada,—a certificate under the seal of the Society or Inn of Court in England, Scotland or Ireland of which he is a member, duly attested under the proper hand of the proper officer thereof, that he has been duly called to the Bar, and was at the date of such certificate on the books of such Society or Inn of Court; and also an affidavit of the applicant to the satisfaction of the Law Society, that since his admission to the Bar, no application to any Society or Inn of Court has been made against him to disbar him

or otherwise to disqualify him from further practice for misconduct in such his capacity of Barrister (*Form No. 9*); 2, and in the case of an Attorney or Solicitor,—a certificate under the seal of the proper court or courts, duly attested under the hand of the proper officer thereof, that he was duly admitted and enrolled as such Attorney or Solicitor, and was at the date of such certificate on the Roll of Attorneys or Solicitors of such court or courts; such certificate must bear date within three months of the first day of the term during which the application is made; and also an affidavit of the applicant, that since his admission no application to any such court or courts (as the case may be) has been made against him to strike him off the the roll of such court, or otherwise to disqualify him in his capacity of attorney or solicitor (*Form No. 10*.)

Applications for certificates of fitness for admission as Attorney or Solicitor must be by petition in writing, addressed to the Benchers of the Law Society in Convocation (*Form No. 12*): and such petition, with the contract of service, &c., and the fees, (which amount to £10 10s.,) must be left with the Secretary of the Society at Osgoode Hall on or before the third Saturday next before the term, in which admission is sought; and the sub-treasurer's receipt for such fees is a sufficient authority to the Examiners to examine the applicant.

Persons who have entered into contracts of service prior to 1st July, 1858, and whose period of service expires in term time, but before the last Thursday of the term, may in lieu of their articles deposit their affidavit, stating the date of the articles, the day when the service thereunder will expire, and when the same were filed, (*Form No. 11*) and may be examined notwithstanding the non-completion of service under the articles; but the certificate of fitness is not issued until the expiration of the period of service, nor until all other requirements of the statute and of the rules of the Society have been complied with.

The candidate upon leaving his petition for certificate of fitness, must leave with the Secretary of the Society, answers of himself and of the Attorney or Solicitor to whom he was bound, to the questions contained in the following schedules:—

Schedule A.

Questions to be answered by the clerk himself:—

1st. What was your age at the date of your articles?

2nd. Have you served the whole term of your articles at the office where the attorney or attorneys to whom you were articulated or assigned carried on his or their business? And if not state the reason.

3rd. Have you, at any time during the term of your articles, been absent without the permission of the Attorney or Attorneys to whom you were articulated or assigned? And if so, state the length and occasion of such absence.

4th. Have you during the period of your articles, been engaged or concerned in any profession, business, or employment other than your professional employment as clerk to the Attorney or Attorneys to whom you were articulated or assigned?

5th. Have you, since the expiration of your articles, been engaged or concerned, and for how long a time, in any and what profession, trade, business or employment, other than the profession of Attorney or Solicitor?

6th. Have you, during the period of your articles, attended the sittings of the Courts of Queen's Bench and Common Pleas at Toronto, or either of them, during the two terms required by the statute in that behalf? And if so, in the course of such attendance, any casual absence from sickness or other unavoidable impediment occurred, state the occasions and the cause thereof.

Schedule B.

Questions to be answered by the Attorney or Solicitor or his agent with whom the clerk may have served any part of the time under his articles, with the certificate of such Attorney, Solicitor, or Agent:—

1st. Has A. B. served the whole term of his articles at the office where you carry on your business? And if not, state the reason.

2nd. Has the said A. B. at any time during the term of his articles, been absent without your permission? And if so, state the length and occasion of such absence.

3rd. Has the said A. B., during the period of his articles, been engaged or concerned in any profession, business or employment other than his professional employment as your articulated clerk?

4th. Has the said A. B., during the whole term of his clerkship, with the exceptions above-mentioned, been faithfully and

diligently employed in your professional business of an Attorney or Solicitor?

5th. Has the said A. B., since the expiration of his articles, been engaged or concerned, and for how long a time, in any and what profession, trade, business, or employment other than the profession of an Attorney or Solicitor?

6th. And I do hereby certify that the said A. B. has duly and faithfully served under his articles of clerkship (or assignment, as the case may be) bearing date, &c., for the term therein expressed; and that he is a fit and proper person to be admitted as an Attorney.

If a candidate cannot procure the answers to the questions contained in schedule B, or the certificate of service, and he should at the time of leaving his papers with the Secretary of the Society, prove to his satisfaction that it is out of his power to procure them; and the Secretary will then state the circumstances specially in his report to Convocation on the candidate's petition, and thereupon the Benchers will dispense with the production of them, as they may think fit and reasonable.

The examinations are partly written and partly oral. The written examination is in the following books and subjects:—Blackstone's Commentaries, vol. I.; Smith's Mercantile Law; Williams on Real Property; Story's Equity Jurisprudence; the Statute Law; and the Pleadings and Practice of the Courts.

The written examination takes place at Osgoode Hall, on the last Wednesday of the vacation previous to the term in which the petitions of the candidates are to be presented, commencing at 10 o'clock A. M. The answers to the questions must be delivered to the Examiner by 3 o'clock P. M. of the same day.

The oral examination takes place on the first day of term; but it is not entered upon until the examination of all candidates for call to the Bar on the order for that day is first disposed of.

Upon passing his examination the candidate receives a certificate under the seal of the Society, of his due service under articles, and of his fitness and capacity, and of his having complied with the requirements of the Act relating to Attorneys at Law, (U. C. Con. St., c. 35) and that he is in all respects duly qualified to be admitted as an Attorney and Solicitor; upon production of which to one of the judges of the Superior Courts of Law or Equity, annexed to the certificate of the original contract of service and assignments

thereof and affidavits of due service thereunder, and other certificates required, such judge endorses his fiat of admission upon the certificate of the Law Society; and thereupon any of the Superior Courts of Law or Equity may cause the candidate to be admitted and enrolled as an Attorney or Solicitor, having previously administered to him the oath of allegiance and an oath in the words following: "I, A. B., do swear (or solemnly affirm, *as the case may be*) that I will truly and honestly demean myself in the practice of an Attorney (or Solicitor, *as the case may be*) according to the best of my knowledge and ability. So help me God."

The Clerk of the Court whence fiat issues is entitled to the following fees: for fiat and admission and oath, and on signing the roll, \$1, and for certificate, \$2. The Clerk of the Court, on admission upon certificate of admission of any other court, is entitled to a fee for signing the roll and certificate of admission of \$2.

7. Affidavit of Service.

County of }
to wit: } I, E. D., of , gentleman, make oath and say:

1. That under and by virtue of articles of clerkship hereunto annexed, bearing date the day of , A. D. 186 , made between A. B., of , gentleman, one of the attorneys of Her Majesty's Courts of Queen's Bench and Common Pleas at Toronto, and a Solicitor of the Court of Chancery for Upper Canada, of the one part, and C. D., of , gentleman, and this deponent of the other part, I was employed by and actually served in the office of the said A. B., at , being the place where the said A. B. practised in his said business and profession of an Attorney and Solicitor, in the proper practice and business of him, the said A. B., as such Attorney and Solicitor from the day of the date of the said articles of clerkship, inclusive, until the day of , in the year of our Lord one thousand eight hundred and sixty , being a period of years and months;

2. That during the whole of the said period I well and faithfully served the said A. B. as his clerk in the manner required by law;

3. That by Indenture hereunto annexed, bearing date the day of , A. D. 186 , the said articles of clerkship were

duly assigned to G. H., of _____, gentleman, one of the attorneys of Her Majesty's said Courts of Queen's Bench and Common Pleas at Toronto, and a Solicitor of the Court of Chancery for Upper Canada;

4. That under and by virtue of such assignment I was employed by and actually served in the office of the said G. H., at _____, being the place where the said G. H. practised in his said business and profession of an Attorney and Solicitor, in the proper practice and business of the said G. H. as such Attorney and Solicitor from the day of the date thereof, inclusive, until the _____ day of _____, in the year of our Lord one thousand eight hundred and sixty _____, being a period of _____ years and _____ months;

5. That during the whole of the said period I well and faithfully served the said G. H. as his _____ in the manner required by law;

6. That I have served _____ under the said articles of clerkship and assignment thereof, a term of *five* years;

[7. That on the _____ day of _____, in the year of our Lord one thousand eight hundred and _____, I actually took and had conferred upon me by the University of _____, the degree of _____;]

8. That the answers made by me to the several questions set out in schedule A hereunto annexed are respectively true.

Sworn, &c.

E. D.

8. Affidavit of Attorney.

County of _____ }
to wit: } I, A. B., of _____, gentleman, make oath and say:

1. That at the date of the hereunto annexed articles of clerkship [or assignment of articles of clerkship], I was and still am a duly admitted and practising Attorney of Her Majesty's Courts of Queen's Bench and Common Pleas at Toronto, and a Solicitor of the Court of Chancery for Upper Canada;

2. That the office where I then carried on and still carry on my business and profession is at _____;

3. That E. D. named in the said articles of clerkship [or assignment] has actually served and been employed by me in the proper practice and business of an attorney and solicitor from the _____ day

of in the year of our Lord one thousand eight hundred and , being the date of the said articles of clerkship [*or assignment*] until the day of in the year of our Lord one thousand eight hundred and sixty , being a period of years and months:

4. That during the whole of the said period the said E. D. well and faithfully served me as my clerk in the manner required by law;

5. That the answers by me made to the several questions set out in Schedule B. hereunto annexed are respectively true.

Sworn, &c.

A. B.

9. *Affidavit of applicant in class 8.*

County of , { I E. D. of , esquire, make oath and
to wit: { say:

1. That I was on the day of in the year of our Lord one thousand eight hundred and duly called to the bar of *Her Majesty's Court of Queen's Bench at Westminster* [*as the case may be*]; and that my name was at the date of the hereunto annexed certificate upon the books of [*Society or Inn of Court*] as a member thereof:

2. That since my said admission to the Bar of the said Court, no application has been made to the said [*Society or Inn of Court*] or to any Society or Inn of Court against me to disbar me or otherwise to disqualify me for misconduct in such my capacity of Barrister of the said Court.

Sworn, &c.

E. D.

10. *Affidavit of Applicant in classes 4 and 5.*

County of , { I E. D. of , gentleman, make oath
to wit: { and say:

1. That I was on the day of in the year of our Lord one thousand eight hundred and duly admitted and enrolled an attorney of *Her Majesty's Court of Queen's Bench at West-*

minister [as the case may be]; and that my name was on the day of last on the Roll of Attorneys of the said Court:

2. That since my said admission and enrolment as aforesaid, no application to the said Court has been made against me to strike me off the Roll of the said Court, or otherwise to disqualify me in my capacity as such attorney.

Sworn, &c.

E. D.

11. Affidavit of person articulated before 1st July, 1858.

County of , } I E. D. of , gentleman, make oath
to wit : } and say :

1. That I was on the day of in the year of our Lord one thousand eight hundred and fifty by articles of clerkship bearing date that day, duly bound to A. B. to serve him as his clerk for the term of five years; which articles of clerkship were duly filed in the office of the Clerk of the Crown and Pleas of the Court of Queen's Bench at Osgoode Hall on the day of following;

2. That the said term of five years will expire in term next and before the last Thursday of the said term, namely on the day of next.

Sworn, &c.

E. D.

12. Petition for Certificate.

To the Benchers of the Law Society of Upper Canada, in Convocation :

The petition of E. D. [names in full] of , gentleman, most respectfully sheweth,

That your petitioner is of the full age of twenty-one years;

That he has received a professional education, which he trusts sufficiently qualifies him to commence the practice of the profession of an Attorney-at-law and Solicitor in Chancery;

[That before the date of the articles of clerkship hereinafter

mentioned, he had taken and had actually conferred upon him by the University of , the degree of ;]

That he has served a continued term of *five* years, under articles of clerkship to the several persons hereinafter named ;

That he received his professional education for the respective terms hereinafter mentioned in the offices and under the superintendence respectively of the several persons hereinafter named, that is to say :—for the term of years and months in the office, and under the superintendence of A. B. of , gentleman, one of the attorneys of Her Majesty's Courts of Queen's Bench and Common Pleas at Toronto, and a Solicitor in the Court of Chancery for Upper Canada ; and for the term of years and months in the office and under the superintendence of G. H. of , gentleman, one of the attorneys of Her Majesty's said Courts of Queen's Bench and Common Pleas and a solicitor of the said Court of Chancery ;

That he has, during the term of his said service, in accordance with the provisions of the Statute in that behalf, attended during two terms the sittings *in banc* of the court of *Queen's Bench* at Toronto, that is to say, during the terms of and in the year of our Lord 186 ;

And that he is desirous of being admitted an attorney and solicitor of the said courts respectively.

Your petitioner therefore most respectfully prays that, his qualifications being first examined and found sufficient according to the Rules of your honourable Society and the standing orders of Convocation in that behalf, he may receive a certificate of fitness pursuant to the Statute in that behalf, and be admitted an attorney of Her Majesty's said courts of Queen's Bench and Common Pleas at Toronto, and a solicitor of the Court of Chancery for Upper Canada :

And your petitioner will ever pray.

WITNESS : }
J. K. }

E. D.

Hilary Term 25 Victoria.

PART III.

THE LAW SCHOOL.

By a Rule of Convocation passed 13th June, 1861, a Law School was established by the Law Society (*a*), having its seat at Osgoode Hall, and designated the "Law School of Osgoode Hall." From that order we quote at length :

"By the Benchers, &c., it is ordered—

"That there be established a School of Law, to have its seat at Osgoode Hall, and to be designated 'The Law School of Osgoode Hall;'

"That the tuition of the pupils attending such Law School be by means of lectures, readings and meetings, and otherwise as may be from time to time prescribed by Rules and Regulations for the conduct of the said school to be framed by a Standing Committee of the Society on Legal Education ;

"That the tuition of the pupils of the said school be conducted by four Readers, to be designated respectively the Reader on Common Law, the Reader in Equity, the Reader on Commercial Law, and the Reader on the Law of Real Property ;

"That the said Readers shall be selected from the members of the Society of the Degree of Barrister at Law ;

"That immediately upon this rule going into effect, and hereafter on the first Saturday in Michaelmas Term in each year, there shall be appointed a Standing Committee of Convocation, to con-

(*a*) The institution of the Law School is chiefly due, we understand, to the present Treasurer of the Law Society, the Hon. John Hillyard Cameron, Q. C., whose endeavours to raise the standing of the Society and to increase its usefulness, cannot be the subject of too much praise. If we may take the first examination for scholarships (which took place in Michaelmas Term last, 1861) as a criterion to judge by, we may fairly say that the Law School will be eminently successful. A report of that examination is contained in the Law Journal of December, 1861.

sist of five members and the Treasurer for the time being, and to be styled the Committee on Legal Education ; which committee shall be charged with the superintendence of the said Law School, and of all examinations of the Society in law, except examinations in open Convocation ;

“That the existing rules of this society, as to the keeping of terms and compulsory attendance on lectures during Term by Students at Law (*b*), do remain in force, with this addition, that there be two lectures on each day during Term, instead of one as heretofore ; the hours of such lectures, and the division of the lectures in Term among the four Readers to be determined by rules from time to time to be made by the Committee on Legal Education ; but the lectures during Term to be nevertheless considered as delivered in the Law School, and as forming part of the course of instruction in law afforded therein ;

“That, in addition to the lectures in Term, there be established courses of lectures to be delivered during the Educational Terms of the Law School ; of which Educational Terms there shall be three in each year, to commence respectively on the first Monday after Hilary, Trinity and Michaelmas Terms, and to continue during six consecutive weeks ; during each of which Educational Terms each Reader shall deliver a course of lectures upon a subject of legal science, to be selected by the Reader and approved of by the Committee on Legal Education ;

“That, in addition to lectures, the Readers, during such Educational Terms, shall hold readings, shall preside at meetings, and shall perform such other duties as may be prescribed by the rules and regulations to be framed by the Committee on Education ;

“That attendance on the lectures in the Law School during the Educational Term shall be voluntary ;

“That tickets of admission to the Law School during each Educational Term shall be issued by the Secretary to Students at a charge of $\$1$ for each ticket ;

“That all written examinations in law shall be conducted in the Law School, in the presence of at least two of the Readers and one Benchman who is a member of the Committee on Legal Education ;

(b) See *ante* page 314.

"That there shall be four Scholarships awarded annually in the said Law School to students standing on the books of the Society, of the respective annual values of £30, £40, £50 and £60, and open for competition as follows—£30 scholarships to students under one year, £40 scholarships to students under two years and over one year, £50 scholarships to students under three years and over two years, and £60 scholarships to students under four years and over three years; any degree entitling to call in three years to be considered as equivalent to two years on the books. Each scholarship to be tenable for one year only; but the holder of the £30, £40 and £50 scholarships to be eligible to election to a higher scholarship in the succeeding year;

"That the annual allowance to such scholars shall be paid to them out of the general funds of the Society, quarterly, on the first Monday after each Term;

"That the examination for scholarships be conducted by the same persons, and in the same manner as other examinations in law, and in such books and on such subjects as the Committee on Legal Education may determine;

"That the successful candidates for such scholarships be determined by Convocation, and the scholarships be awarded in a formal manner by the Treasurer in open Convocation."

The books prescribed for the examinations next Michaelmas Term are: (c)

First year.—Stephen's Blackstone, vol. I; Stephen on Pleading; Williams on Personal Property; and Story's Equity Jurisprudence, from the beginning to § 440.

Second year.—Williams on Real Property; Best on Evidence; Smith on Contracts; Story's Equity Jurisprudence, 2 vols.

Third year.—Real Property, Statutes relating to Upper Canada; Stephen's Blackstone, Book 5; Byles on Bills; Hayne's Outlines of Equity; and Coote on Mortgages.

Fourth year.—Burton on Real Property; Russell on Crimes, and Common Law Pleadings and Practice; Smith's Mercantile Law; Dart on Vendors and Purchasers; and Mitford on Pleading and on Equity Pleading and Practice.

(c) At the last examination the books prescribed were different, and we understand that the list will be changed every year.

In each year the examinations may comprise questions on the Canadian Statutes, affecting the prescribed subjects, where the text is varied by such Statutes.



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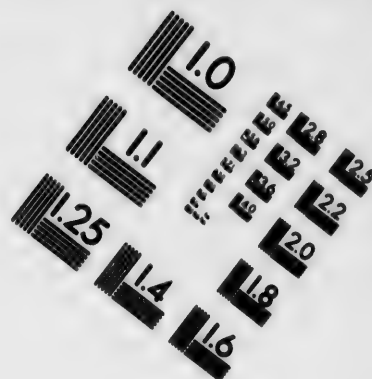
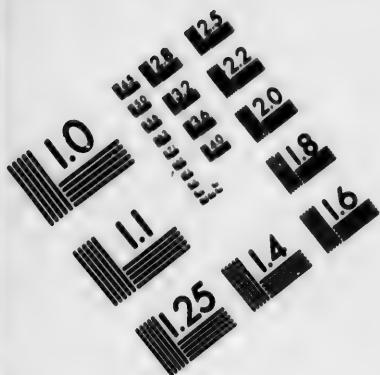
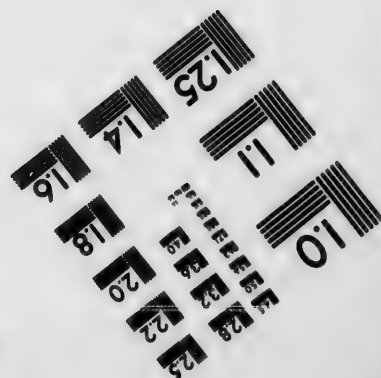
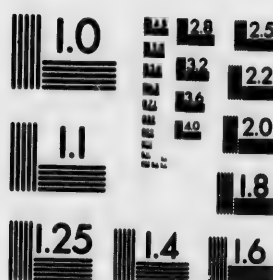


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